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No. 99-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DISTRICT INTOWN PROPERTIES LIMITED PARTNERSHIP, ET AL.,
Petitioners,

v.

DISTRICT OF COLUMBIA, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When analyzing a governmental regulation of property for Takings Clause purposes, how should courts determine the relevant unit of property in a case where a landowner owns several geographically contiguous parcels, only some of which are burdened by the regulation?

2. Does a governmental regulation of property that requires a landowner to leave eight contiguous lots in a completely undeveloped state as a grass lawn deny "all economically beneficial or productive use of land" within the meaning of *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992)?

PARTIES TO THE PROCEEDING

Petitioners District Intown Properties Limited Partnership, William Calomiris, and Peter Calomiris, were the appellants in the court below. Respondents District of Columbia, District of Columbia Department of Consumer and Regulatory Affairs, and Anthony A. Williams, in his official capacity as Mayor of the District of Columbia, were the appellees in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners District Intown Properties Limited Partnership, William Calomiris, and Peter Calomiris respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 198 F.3d 874 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the District of Columbia is reported at 23 F. Supp. 2d 30 and reproduced at App. 29a.

JURISDICTION

The judgment of the D.C. Circuit was entered on December 17, 1999. App. 1a. On March 2, 2000, the Chief Justice

extended the time to petition for certiorari to and including April 17, 2000. App. 46a. The jurisdiction of the D.C. Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

Petitioners, District Intown Properties Limited Partnership and its two partners, William Calomiris and Peter Calomiris, are the owners of nine contiguous lots (designated as Lots 106-114) in Washington, D.C., facing Connecticut Avenue northwest of its intersection with Cathedral Avenue. Cathedral Mansions South, a rental apartment building designed in the 1920s by architect Harry Wardman, is located on Lot 106. There are no buildings or other structures on Lots 107-114, which are instead maintained as a grass lawn. Petitioners purchased Cathedral Mansions South and the eight acres of surrounding property in 1961. At that time, the apartment building and the lawn comprised a single lot. In June 1988, however, the District of Columbia granted petitioners' application to subdivide the original parcel into the nine present lots. App. 1a, 3a, 29a.

In December 1988, petitioners applied for permits to build one single-family townhouse on each of the eight vacant lots. In March 1989, the zoning and structural engineering divisions of the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") granted zoning approval for the construction. That same month, however, opponents of the project filed a petition to have Cathedral Mansions South designated an historic landmark. In May 1989, the District's Historic Preservation Review Board ("Review Board") granted the petition and declared not only the

apartment building, but also the adjacent lawn area, an historic landmark.[1] Petitioners' building permits were thus referred to the Review Board for its consideration. App. 3a-4a, 29a-30a.

In March 1992, the Review Board recommended denial of petitioners' permit applications as inconsistent with the landmark designation. Petitioners sought review of that determination before the DCRA, which acted as the Mayor's agent. In March 1993, however, the DCRA agreed with the Review Board that petitioners' permit applications should be denied. In so doing, the DCRA concluded that "any construction destroying the lawn" would be incompatible with the historic landmark status of the eight lots. D.C. Cir. J.A. 368. The DCRA also purported to hold that the denial of petitioners' permits would not cause them to suffer economic hardship or result in an unconstitutional taking of their property. The District of Columbia Court of Appeals, however, held that this "holding" was beyond the DCRA's statutory jurisdiction and therefore would have no preclusive effect in any subsequent litigation. *See District Intown Properties, Ltd.* v. *District of Columbia Dep't of Consumer & Regulatory Affairs*, 680 A.2d 1373 (D.C. 1996). App. 4a-5a, 31a-32a.

Petitioners then filed suit under the Takings Clause of the Fifth Amendment and 42 U.S.C. § 1983 against the District of Columbia, the DCRA, and the Mayor, alleging that the

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[1] Petitioners supported the designation of Cathedral Mansions South as an historic landmark but objected to the designation of the lawn. D.C. Cir. J.A. 44. As Judge Williams of the D.C. Circuit commented, "[a] cynic might suspect that the alleged relationship between the lawn and the Cathedral Mansions apartment is little more than a cloak by which the citizens of Upper Northwest Washington have secured some parkland on the cheap. Parks are good, but the Fifth Amendment says that taking them is not." App. 26a-27a.

denial of their permit applications constituted a regulatory taking of property for which just compensation was required. Relying on *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), petitioners argued that the DCRA's determination that there could be no construction disturbing the lawn deprived the property of all economically beneficial or productive use and thus effected a taking. App. 5a, 32a.

The District Court recognized that, in analyzing petitioners' takings claim, it "first has to identify the relevant parcel of property * * * so that it can assess whether the governmental deprivation has been total or partial." App. 36a-37a. Applying a multi-factor balancing test, the District Court concluded that the "the relevant parcel is a singular lot consisting of the apartment building and the lawn." App. 38a. Based on that conclusion, the District Court ruled that the property, as so viewed, had not been deprived of all value because Lot 106 contains "an apartment building that produces rental income and that possesses market value." App. 39a. The District Court therefore granted summary judgment in favor of respondents. App. 45a.

The D.C. Circuit affirmed. The court acknowledged that under *Lucas*, "regulations pursuant to which the government denies *all* economically beneficial or productive use of property" result in "a 'categorical' or *per se* taking." App. 7a (emphasis in original). The court also recognized that

> we must first define what constitutes the relevant parcel before we can evaluate the regulation's effect on that parcel. In the instant case the question is: Does the relevant parcel consist of the property as a whole or do the eight lots for which construction permits were denied constitute the relevant parcels? [App. 8a.]

Like the District Court, the D.C. Circuit held that "all nine lots should be treated as one parcel for the purpose of the court's takings analysis." App. 9a. The D.C. Circuit noted that "[t]he District Court used several factors to determine

the relevant parcel: the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot." App. 8a. The D.C. Circuit approved the District Court's consideration of these factors as "eminently sound" and "mirror[ing]" the approach taken by some other courts in regulatory takings cases. App. 9a.

Applying the various factors, the D.C. Circuit determined that the first three factors pointed in favor of treating all nine lots as a single parcel, stating that "[t]he lots are spatially and functionally contiguous. District Intown purchased the property as a whole in 1961 and treated it as a single indivisible property for more than 25 years." App. 9a. The court was not swayed by petitioners' "intentional act" of subdividing the original lot in 1988. App. 9a. With respect to the fourth factor, the economic synergy between the parcels, the court said that "[w]hile there is a dispute as to whether the adjacent landscaped lawn increases the apartment building's value," this factor was outweighed by "application of the other three factors." App. 9a. The D.C. Circuit also gave no weight whatsoever to the fact that "the District of Columbia has taxed Lots 107 through 114 at a higher rate since subdivision, reflecting the District of Columbia's assessment that these lots are vacant developable land." App. 12a.

Having determined that all nine lots should be deemed one unit of property for takings analysis, the D.C. Circuit rejected petitioners' *Lucas* claim on the ground that, because the apartment building is valuable, the property as a whole had not been deprived of all economic value. App. 13a. The D.C. Circuit did not stop there, however. The court went on to hold in the alternative that, even if the eight vacant lots were to be viewed separately from Lot 106, petitioners' *Lucas* claim would still fail. The court acknowledged that "[t]he record contains a finding by the Mayor's agent that any construction that destroyed the lawn would be incompatible with the lawn's status as a historic landmark," but

held nevertheless that "the record does not support the conclusion that Lots 107 through 114 are rendered 'valueless' by the regulation at issue." App. 13a. The D.C. Circuit did not identify what economically productive uses the property could be put to while subject to requirement that it be kept as a grass lawn.

Judge Williams concurred in the judgment. He sharply criticized the "prevailing" Takings Clause analysis such as employed by the majority as "elevat[ing] formal concepts over economic reality and tend[ing] to strip the Clause of its potential for fulfilling the framers' likely purposes." App. 17a. He also "note[d] the ways in which modern interpretation of the Takings Clause, as exemplified in today's decision, impairs its role as a disincentive to wasteful government activities." App. 19a. Nevertheless, Judge Williams joined in the outcome of the case because "[t]he majority's disposition is—with one important exception—in general accord with the current opinions of the Supreme Court." App. 17a.

Judge Williams strongly disagreed with the multi-factor analysis applied by the majority for determining the relevant parcel, stating that the considered factors "strike me as uninformative and largely irrelevant" as they "focus[] on marginal issues and largely overlook[] the more critical concern of synergies." App. 24a, 28a. As Judge Williams further explained:

> The first factor, contiguity, is clearly necessary but in no way sufficient. The next two factors—simultaneity of acquisition and unity of use—are more troublesome. Both elevate history—either the historical purchase or the historical use—over the real-world present relationship between the tracts. The majority's focus on the property's use prior to regulation tells us nothing about the value-producing opportunities foreclosed at the time of regulation. The majority mentions but brushes aside a fourth factor—the extent to which the regulated parcel

> benefits the neighboring lot. Yet this appears the most relevant. The more a burdened tract in its regulated use benefits contiguous property, the less likely that the regulation has a negative impact. [App. 24a-25a (citations and quotations omitted).]

Finally, Judge Williams took issue with the majority's alternative holding that, even if the Lots 107-114 were to be seen as units separate from Lot 106, the eight lots had not been deprived of all economically viable uses. Noting that "the Mayor's own agent found that 'any construction that destroyed the lawn would be incompatible with the lawn's status as an historic landmark,' " App. 28a (quoting the majority, App. 13a), Judge Williams reasoned that "[i]t is hard to imagine what 'economically viable' use that constraint leaves, unless the majority means that the very barest thread of value, yielded by some thoroughly bucolic use, is enough to defeat a total takings claim. By this standard, no regulation can ever effect a total taking" under *Lucas*. App. 28a.

Neither the historic landmark designation nor the denial of petitioners' requested building permits was at issue in the courts below or is challenged here; the issues before the Court relate solely to petitioners' takings claim.

REASONS FOR GRANTING THE WRIT

I. THE LOWER FEDERAL COURTS AND STATE COURTS ARE BADLY CONFUSED ABOUT AND IN SHARP CONFLICT OVER THE CRITICAL ISSUE OF HOW TO DETERMINE THE RELEVANT UNIT OF PROPERTY IN REGULATORY TAKINGS CASES.

In *Lucas* v. *South Carolina Coastal Council*, this Court held that a governmental regulation of property that "denies all economically beneficial or productive use of land" constitutes a *per se* or "total" taking for which just compensation is required. 505 U.S. at 1015, 1030. In his opinion for

the *Lucas* Court, Justice Scalia dropped an important footnote:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. * * * Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. * * * [*Id.* at 1016-17 n.7.]

The "denominator" referred to by Justice Scalia recalls this Court's statement in *Keystone Bituminous Coal Association* v. *DeBenedictis*, 480 U.S. 470 (1987): "Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' " *Id.* at 497 (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967)).[2]

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[2] Thus, the takings fraction is x / y, where x represents the economic loss from the regulation of property and y represents the value of the property absent the regulation. A total taking occurs under *Lucas* when $x / y = 1$.

This case presents the very issue identified in footnote seven of *Lucas*,[3] and is similar on its facts to Justice Scalia's hypothetical rural tract burdened by the requirement that 90% of the property be left in its natural state. Petitioners own nine contiguous lots, and the regulation at issue here requires them to leave eight of the lots in a completely undeveloped state as a grass lawn. The question is whether the "denominator" in the takings fraction consists of all nine lots or only the eight vacant lots subject to the regulation.

As the D.C. Circuit correctly recognized in this case, "[t]he definition of the relevant parcel profoundly influences the outcome of a takings analysis." App. 8a. *See also Keystone*, 480 U.S. at 497 (determining the denominator is "one of the critical questions" in regulatory takings cases); *id.* at 514-515 (Rehnquist, C.J., dissenting) ("The need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant parcel."); Matt Snow, Note, *Defining the Relevant Property in Regulatory Takings Claims*, 17 J. Land Resources & Envtl. L. 403, 403 (1997) ("How the relevant parcel is defined may be the key factor in determining whether or not a taking is found."). The broader the relevant unit of property is viewed, the less likely it is that a court will find a taking. *See* App. 19a-20a (opinion of Williams, J.) ("The larger the parcel, the greater the chance that the regulated land will retain an economically viable use."). Conversely, the more narrowly a court views the relevant parcel, the more likely it is that a *Lucas* claim will be sustained. *See Lucas*, 505 U.S. at 1065 (Stevens, J., dissenting) ("The smaller the estate, the more likely that a regulatory change will effect a total taking.").

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[3] The *Lucas* Court did not have to resolve this issue since that case involved two adjacent lots both of which had been deprived of all value. Thus, it was clear in *Lucas* that the denominator in the takings equation was equal to the numerator.

Nevertheless, although the determination of the relevant parcel is an undeniably important issue, and may in fact be the dispositive factor in a regulatory takings case, this Court "has never squarely addressed the question of how courts should define the relevant geographic parcel of land, also known as 'horizontal severance.' " App. 22a (opinion of Williams, J.). *See also Stupak-Thrall* v. *United States*, 89 F.3d 1269, 1295 (6th Cir. 1996) (Boggs, J., dissenting) (determining the denominator is a "vexing matter * * * left open in the famous footnote 7 of *Lucas*"), *cert. denied*, 519 U.S. 1090 (1997); James S. Burling, *What If the Government Prohibits the Use of Only Some of Your Property—Has There Been a Regulatory Taking?*, SE18 ALI-ABA 113, 129 (1999) ("[S]even years after the *Lucas* Court explained that a denial of all use and value is a categorical taking, we still do not know how to determine the size of the relevant parcel for a takings analysis."); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 668 (1996) ("The Supreme Court has recognized the existence and importance of the issue, but has yet to provide any real guidance."). In particular, this Court has "never decided a case involving the horizontal division of land"—the very situation presented here. John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1545 (1994).

The lack of guidance from this Court has left the lower courts in disarray and resulted in a patchwork of conflicting decisions. *See East Cape May Assocs.* v. *State of New Jersey*, 693 A.2d 114, 128 (N.J. Super. Ct. App. Div. 1997) (noting the "presently unsettled state of New Jersey and Federal law on the question of how to determine the relevant 'property' "); Burling, *supra*, at 119 ("For the simple question of what is the relevant parcel when government prohibits the use of only a discreet segment of land, the lower courts are hopelessly split."); John M. Groen, *The Relevant Parcel Issue*, C872 ALI-ABA 167, 181 (1993) ("[T]here remains

great uncertainty as to how to define what unit of property is the appropriate whole parcel. The cases which deal with this issue are conflicting and in some cases irreconcilable."); Snow, *supra*, at 405 ("lower courts' decisions regarding the definition of relevant property are erratic and at times conflicting"). Only this Court can resolve the confusion in the lower courts. *See* Burling, *supra*, at 129 ("Until the Supreme Court reaches this issue, confusion will be the watchword in the lower courts."); Lisker, *supra*, at 706 ("Until the Supreme Court addresses this issue head-on, inconsistencies are bound to occur.").

Left to their own devices, the lower courts have adopted "various approaches to defining the relevant parcel [which] may be grouped into three categories: 1) contiguous land under a common owner; 2) multifactor analysis based on reasonable expectations; and 3) the property interest as defined by the regulation or development approach." Fee, *supra*, at 1545-46. *See also* Lisker, *supra*, at 670 (noting that the lower federal courts have developed "numerous approaches").

Under the first approach, the relevant parcel consists of all of the property owner's geographically contiguous land. *See Karam* v. *State of New Jersey*, 705 A.2d 1221, 1227-28 (N.J. Super. Ct. App. Div. 1998) (noting that some courts have "considered the composition of the denominator of the taking fraction as consisting of all of the claimant's contiguous acreage in the same ownership" but that "[t]his is not the universal rule"), *aff'd*, 723 A.2d 943 (N.J.), *cert. denied*, 120 S. Ct. 51 (1999).

Under the second approach—the one employed by the courts below—the court applies a multi-factor balancing test. Here, for example, the D.C. Circuit and the District Court considered "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the

unregulated lot." App. 8a. Consideration of these factors, said the D.C. Circuit, "mirrors the approach taken by other courts in regulatory takings cases." App. 9a (citing *Forest Properties, Inc.* v. *United States*, 177 F.3d 1360 (Fed. Cir.), *cert. denied*, 120 S. Ct. 373 (1999); *K & K Constr. Co.* v. *Department of Natural Resources*, 575 N.W.2d 531 (Mich.), *cert. denied*, 525 U.S. 819 (1998)). *See also, e.g.*, *Ciampitti* v. *United States*, 22 Cl. Ct. 310, 318-319 (1991).

Under the third approach, the scope of the government's regulation or prohibition on the use of property determines the relevant parcel. *See Karam*, 705 A.2d at 1228 ("Several decisions have held that the denominator of the taking fraction is the portion of the property subject to the confiscating regulation."). Under the third approach, when the government regulation "prohibit[s] all viable economic uses of a material part of substantial, contiguous acreage owned by the same titleholder, the owner is entitled to fair compensation for the land subject to the law or regulation, even though the land continues to benefit from the remaining portion of its property." *East Cape May Assocs.*, 693 A.2d at 126.

The conflicts and confusion that abound in the lower courts are reflected in *Volkema* v. *Department of Natural Resources*, 542 N.W.2d 282 (Mich. Ct. App. 1996), *aff'd in part & disapproved in part*, 586 N.W.2d 231 (Mich.), *cert. denied*, 525 U.S. 1040 (1998). In that case, the property owners owned a 24.6-acre parcel of which six acres were rendered useless by government regulation. Two judges on the panel concluded that "plaintiffs' loss should be considered in light of the 24.6 acres, not merely the affected six acres." 542 N.W.2d at 285. The third judge, however, dissented and would have held that "where a property owner is prohibited from making use of his property, or even a portion of the property, then there is a taking with respect to the identifiable portion which cannot be used." *Id.* at 288 (Sawyer, J., dissenting). He added that

> I believe that the question posed in [footnote seven of] *Lucas* is best answered by concluding that a taking occurs where a regulation precludes the use of an identifiable, discreet piece of property, even if that property forms only a portion of a larger parcel. I do not find it relevant how large a portion of property the owner possesses. [*Id.*]

Volkema thus illustrates the fundamental disagreement that has emerged as to whether the relevant parcel in regulatory takings cases is all contiguous property held by the property owner, as the majority held, or only that portion of the property burdened by the regulation at issue, as Judge Sawyer would have held. Still other courts, such as the courts below, have eschewed these approaches in favor of a multi-factor balancing test.

A recent decision of the Federal Circuit is also indicative of the confusion in the lower courts. *See Palm Beach Isles Assocs.* v. *United States*, No. 99-5030, __ F.3d __, 2000 WL 337591 (Fed. Cir. Mar. 31, 2000). There, a group of investors ("PBIA") bought 311.7 acres of land in Florida in 1956. In 1968, PBIA sold 261 acres of the property to a developer. Many years later, the Federal Government denied PBIA permission to develop the remaining 50.7 acres. *See id.* at *1-*2. Rejecting PBIA's takings claim, the Court of Federal Claims determined that relevant parcel was the entire initial 311.7-acre parcel, even though PBIA had sold 261 of the acres in 1968. *See id.* at *2. On appeal, "[t]he Government argue[d] that since the land was purchased together, it should be treated as one parcel. PBIA should not be allowed to sever the part that is subject to the regulation from the part that is not." *Id.* at *3. The Federal Circuit, however, rejected that argument and the relevant parcel determination of the Court of Federal Claims. The Federal Circuit said that "[c]ombining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the

tracts sold for a substantial price, cannot be justified." *Id.* at *6.

In short, the relevant parcel issue is an issue of critical importance in regulatory takings cases, as this Court has acknowledged. The absence of guidance from this Court, however, has led the lower courts to develop no fewer than three inconsistent methodologies for determining the denominator in takings analysis, and has resulted in a host of irreconcilable decisions. It is unacceptable that property rights under the Takings Clause should be so unpredictable and depend so heavily upon the jurisdiction in which property is located.

II. THE D.C. CIRCUIT'S ANALYSIS AND RESOLUTION OF THE RELEVANT PARCEL ISSUE IN THIS CASE CONFLICTS WITH THE DECISIONS OF OTHER APPELLATE COURTS.

The D.C. Circuit's application of a multi-factor balancing test to hold that all nine of petitioners' lots constituted the relevant unit of property for takings analysis purposes squarely conflicts with the decisions of several other courts of appeals that have held the relevant parcel in a regulatory takings case to be only that portion of the land subject to the regulation at issue.

In *Machipongo Land and Coal Co.* v. *Commonwealth of Pennsylvania*, 719 A.2d 19 (Pa. Commw. Ct. 1998), Pennsylvania barred Machipongo from mining its coal contained within a 157-acre tract of a larger 2,037-acre parcel. Two other property owners, Erickson and Naughton, were denied permission to mine 27 acres of a 1,350-acre parcel they owned. Pennsylvania argued that the property owners had not been deprived "of all beneficial use of their land because the designated area only comprises 8% of the total land owned by Machipongo and 2% of the land owned by Erickson and Naughton." *Id.* at 22.

The *Machipongo* panel noted that numerous courts

> have addressed the problem of deciding how the denominator is determined in a regulatory takings case, but they have never agreed on the appropriate method for determining that portion of the fraction and have provided little in the way of guidance. Essentially, though, they have all utilized one of the following three approaches: 1) the contiguous land under a common owner approach; 2) the property interest as defined by the regulation; and 3) the multi-factor analysis. [*Id.* at 26.]

Pennsylvania urged the court to adopt the first approach, but the court declined, citing the "facial unfairness in this approach." *Id.* at 27. The court also rejected the third approach for "fail[ing] to offer either regulators or property owners any certainty as to whether a regulation will result in a taking." *Id.* at 27-28. The court concluded that "the property interest by regulation approach is the best one to determine the denominator," with the proviso that "[i]f the regulated land had no value prior to the regulation because it had no viable use, it could not serve as the denominator and there would be no taking." *Id.* at 28.[4] The court explained that "[t]his approach is best because it fosters predictability, focuses on the effect of the governmental regulation on the property and not on the circumstances of the property owner, and results in fairness because it treats all property owners the same." *Id.* Accordingly, the *Machipongo* court held that "only the regulated land is to be considered in determining the denominator." *Id.*

Applying the *Machipongo* approach to this case, only the properties burdened by the regulation—the eight undeveloped lots comprising the lawn—would be considered in the

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[4] The court noted (719 A.2d at 28 n.22) that this approach was suggested in the *Chicago Law Review* article authored by John Fee. *See supra* at 10.

takings analysis. And the court's proviso would not apply because the eight lots clearly could support economically viable uses absent the historic landmark designation. Therefore, a square conflict exists between *Machipongo* and the decision below—the two courts would have decided this case differently.

The facts of *Twain Harte Associates, Ltd.* v. *County of Tuolumne*, 265 Cal. Rptr. 737 (Cal. Ct. App.), *review denied* (Cal. Apr. 4, 1990), are strikingly similar to the case at hand, yet the court's relevant parcel determination was directly contrary to that of the D.C. Circuit here. At issue in *Twain Harte* was an 8.5-acre parcel, of which 6.8 acres supported a shopping center and 1.7 acres were undeveloped. The property owners had purchased the 8.5 acres as a unit following the construction of the shopping center. After acquiring the property, the owners applied for permission to split the 6.8-acre parcel from the remaining 1.7 acres, but the County denied permission. The County subsequently enacted an ordinance designating the 1.7-acre plot as "open space"—thereby barring the building of any structures on the property. *See id.* at 739-740.

Against the property owners' claim that the undeveloped 1.7-acre plot had been taken, the County argued that the 6.8-acre parcel containing the shopping center had to be considered along with the 1.7 acres for takings purposes, and hence the property owners "suffered no substantive economic deprivation because the 8.5-acre parcel has upon it an operating shopping center of significant size and undoubted monetary benefit." *Id.* at 744. The California Court of Appeal, however, flatly rejected the County's argument and held that "the law does not demand the entire 8.5-acre parcel be treated as a whole" for takings purposes. *Id.* at 745.

The decision below clearly conflicts with *Twain Harte*. In both cases, undeveloped land abutted land bearing income-producing structures. But the *Twain Harte* court, unlike the

court below, held that the undeveloped land—the land burdened by the no-development regulation—could be viewed by itself for takings analysis. Notably, the case for treating the eight vacant lots here as distinct from the lot with the apartment building is even stronger than was the case for separating the two parcels in *Twain Harte*, because there the property owners' application to split the 1.7-acre plot from the rest of the property was *denied*, *see id.* at 739, whereas here permission to subdivide was *granted*.

Other courts have also sustained takings claims where the property owners had unburdened land contiguous to land taken by government regulation. In *Boise Cascade Corp.* v. *Board of Forestry*, 935 P.2d 411 (Or. 1997), Boise Cascade applied to the Board of Forestry for permission to log a 64-acre parcel of its land. The Board denied the request as to 56 of the acres due to the presence of spotted owl nests on the property, but permitted the other eight acres to be logged. *See id.* at 414-415. The trial court dismissed Boise Cascade's takings claim on the ground that it had failed to state a claim for relief. The Oregon Supreme Court disagreed with that assessment, however, and held that Boise Cascade's contention that it had been deprived "of the only economically viable use of approximately 56 acres of merchantable timber" stated a valid takings claim. *Id.* at 420.

Similarly, in *Corrigan* v. *City of Scottsdale*, 720 P.2d 528 (Ariz. Ct. App. 1985), *aff'd in relevant part*, 720 P.2d 513 (Ariz.), *cert. denied*, 479 U.S. 986 (1986), Corrigan owned 5,738 acres of undeveloped land made up of three contiguous parcels of 4,800, 608, and 330 acres, respectively. The City enacted an ordinance that had the effect of prohibiting any new development within 74%-80% of the 4,800-acre parcel, but did not affect the two smaller parcels. *See* 720 P.2d at 530-532. On these facts, the Arizona Court of Appeals concluded that "it is clear that the Hillside Ordinance prevents any development whatsoever on the largest parcel of Corrigan's land. This is a taking." *Id.* at 539. The court

therefore held that the ordinance resulted in "an unconstitutional taking of appellant's property without just compensation." *Id.* at 540. As in *Corrigan*, the fact that petitioners have one lot unaffected by regulation adjacent to eight that are should make no difference or obscure the fact that *this* is a taking.

III. THE D.C. CIRCUIT ERRED IN HOLDING THAT ALL NINE OF PETITIONERS' LOTS SHOULD BE TREATED AS A SINGLE PARCEL FOR TAKINGS ANALYSIS.

The D.C. Circuit was wrong to hold that all nine of petitioners' lots must be viewed as one unit of property for purposes of analyzing petitioners' *Lucas* claim. Instead, the court should have assessed the economic impact of the historic landmark designation as to each of the eight vacant lots without considering the lot with the apartment building.

For the reasons identified by Judge Williams (*see supra* at 6-7), the multi-factor balancing test applied by the District Court and the D.C. Circuit in this case is not a satisfactory method of determining the relevant parcel. *See* App. 24a ("the factors that the majority applies in making the decision * * * strike me as uninformative and largely irrelevant"). *See also Machipongo*, 719 A.2d at 27-28 (concluding that the multi-factor approach "fails to offer either regulators or property owners any certainty as to whether a regulation will result in a taking"); Fee, *supra*, at 1537 (noting that courts have "applied these factors inconsistently, making regulatory taking determinations unpredictable and often arbitrary").[5] Instead, the D.C. Circuit should considered the relevant

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[5] As this Court has commented, multi-factor balancing tests, such as that adopted by the D.C. Circuit here, are "hard to apply," "jettison[] relative predictability for the open-ended rough-and-tumble of factors," and "invit[e] complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995).

parcel to be that portion of the property affected by the regulation at issue, provided that the affected portion could itself sustain an economically viable use. *See* Fee, *supra*, at 1562 ("Where the total restrictions on development affect a significant enough segment of land that it could be independently developed for a profit, the principles of fairness and justice underlying the Fifth Amendment require that the owner be compensated for his loss. Such a case would in principle be no different than *Lucas*.").[6]

If the District of Columbia had simply taken petitioners' eight lots with its eminent domain power to preserve open space in Woodley Park, there is no question it would have had to pay just compensation, regardless of the fact that petitioners have an adjacent lot that generates income. It should make no difference that petitioners have been allowed to keep the property as an undeveloped lawn. *See Groen*, *supra*, at 180 ("[C]ompensation should be made when regulation is applied to deny all use of that portion of a larger parcel. * * * [T]here is no practical difference to the owner between a condemnation of that portion and a negative regulation which achieves the same result").

Another approach superior to the D.C. Circuit's factor-juggling was suggested in footnote seven of *Lucas* itself. There, the Court stated that "[t]he answer to this difficult question [of the relevant parcel] may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particu-

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[6] This approach does not go so far as to prevent government from enacting reasonable property use restrictions. Thus, for example, a set-back ordinance restricting construction within a short distance of a street would not require compensation, because the small strip of land subject to the regulation could not on its own be put to an economically productive use. *See* Fee, *supra*, at 1559.

lar interest in land with respect to which the takings claimant alleges a diminution in (or elimination) of value." *Lucas*, 505 U.S. at 1017.

Here, the District of Columbia certainly did recognize the eight lots as legally separate units of property on which petitioners could build. First, in 1988, the District of Columbia granted petitioners' application to subdivide the property—which required a governmental determination that petitioners had complied with the District of Columbia's substantive subdivision regulations. *See* 10 D.C.M.R. §§ 2700-2799; *id.* at § 2701.1 ("No land or ground in the District of Columbia shall be subdivided for purpose of creating a lot of record, except in conformity with this chapter.").

Second, following the subdivision of the lots, the District of Columbia—as the D.C. Circuit noted—"taxed Lots 107 through 114 at a higher rate" than Lot 106. App. 12a. The reason for the higher tax rate on the eight lots is telling: it "reflect[s] the District of Columbia's assessment that these lots are vacant developable land." App. 12a. *See* D.C. Cir. J.A. 442 ("the assessment department of the District of Columbia [is] treating the property as developable lots"); *id.* at 445 (same). *See also* D.C. Code §§ 47-812, 47-813 (applying a higher property tax rate to unimproved property than to improved property); D.C. Real Estate Reporter, *The Regulation of Real Estate in the District of Columbia* 81 (1994) (purpose of the higher tax rate on unimproved property "is to encourage owners of 'vacant land and buildings to develop or rehabilitate their properties and place them on the rental market' ") (quoting former Mayor Sharon Pratt Kelly).

And third, in 1989, the zoning and structural engineering divisions of the DCRA granted zoning approval for petitioners' proposed town-house construction.[7]

In sum, as of 1989, the District of Columbia had granted regulatory permission to subdivide the original lot into the present nine lots; granted zoning approval for the proposed development; commenced taxing the eight vacant lots at a higher rate on account of their development potential; and failed for the 28 years that petitioners had owned the lawn to designate it a landmark. Accordingly, when the District of Columbia applied the regulatory imposition, petitioners had an entirely reasonable belief that the eight lots were distinct and developable properties.[8]

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[7] It is no answer to say that petitioners should have predicted that their properties would someday be declared an historic landmark. Cathedral Mansions South dates from the 1920s, and petitioners purchased the apartment building and the surrounding property in 1961, yet it was not until 1989—some 28 years later and only after petitioners commenced the development process—that the residents of Woodley Park and the District of Columbia were struck with the epiphany that the grass lawn is itself an historic landmark.

[8] *See* Laura M. Schleich, *Takings: The Fifth Amendment, Government Regulation, and the Problem of the Relevant Parcel*, 8 J. Land Use & Envtl. L. 381, 402 (1993) ("An appropriate and accurate measure of the relevant parcel should isolate the property taken at the moment of regulation.").

IV. THE D.C. CIRCUIT'S HOLDING THAT PETITIONERS' VACANT LOTS RETAINED ECONOMICALLY VIABLE USES—DESPITE THE REQUIREMENT THAT THE LOTS BE MAINTAINED AS A LAWN—CONFLICTS WITH THE RULE OF *LUCAS* AND THE DECISIONS OF OTHER APPELLATE COURTS.

The second question presented relates to the D.C. Circuit's alternative holding that, even if petitioners' eight vacant lots were to be viewed as separate from the ninth lot, there still was no taking under *Lucas* because the eight lots have not been deprived of all economically viable use. Remarkably, the court so held even while acknowledging that "[t]he record contains a finding by the Mayor's agent that any construction that destroyed the lawn would be incompatible with the lawn's status as a historic landmark." App. 13a. This holding cannot be reconciled with the rule of *Lucas* or the decision of other courts applying the *Lucas* rule. As Judge Williams said, "[i]t is hard to imagine what 'economically viable' use that constraint leaves, unless the majority means the very barest thread of value, yielded by some thoroughly bucolic use, is enough to defeat a total takings claim. By this standard, no regulation can ever effect a total taking" under *Lucas*. App. 28a.[9]

In *Lucas*, David Lucas owned two beachfront lots on which he planned to build single-family homes, but the South

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[9] As noted above, although Judge Williams fundamentally disagreed with the takings analysis applied by the majority in this case, he concurred in the judgment because "[t]he majority's disposition is—with one important exception—in general accord with the current opinions of the Supreme Court." App. 17a. The majority's alternative holding on the *Lucas* issue is that "important exception." *See* App. 27a-28a (the majority "gratuitously takes an even harsher stance against compensation than does present law" in its holding that "so long as the lawn is untouched, 'economically viable' uses are permitted").

Carolina Coastal Council barred him from erecting any permanent habitable structures on the lots, thus requiring him to leave the land undeveloped. This Court confirmed that compensation is required when government enacts "regulations that leave the owner of land without economically beneficial or productive options for its use—*typically, as here, by requiring land to be left substantially in its natural state*." 505 U.S. at 1018 (emphasis added). Likewise, the District of Columbia has here required petitioners to leave each of their eight vacant lots "substantially in its natural state"—each lot must be maintained as a grass lawn.

Following *Lucas*, in *McQueen* v. *South Carolina Coastal Council*, 496 S.E.2d 643 (S.C. Ct. App. 1998), *cert. granted* (S.C. Mar. 18, 1999), the Coastal Council denied the property owner permission to build on his two coastal lots. Concluding that "the case at bar epitomizes a remarkable similitude to *Lucas*," the South Carolina Court of Appeals held that "McQueen has suffered a textbook taking" under *Lucas* since "the Coastal Council's denial of McQueen's permit applications for the two lots deprives him of all economically beneficial use of the land." *Id.* at 648, 650. This case, too, is a textbook *Lucas* violation; petitioners were denied permission to build single-family townhouses on their vacant lots and were told that they could not make any use of the lots that would disturb the lawn. Thus, the decision of the court below conflicts with the *Lucas* rule and *McQueen*.

In *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999), the City denied Del Monte's application for a permit to develop its ocean-front property into a residential complex. The Ninth Circuit held that Del Monte had been deprived of all economically viable use of its property within the meaning of *Lucas*, explaining that "[t]he jury essentially accepted Del Monte's argument that the City forced Del Monte to bear the burden of creating open space for the public to enjoy." 95

F.3d at 1434.[10] The same principle supports the conclusion here that the District of Columbia's requirement that petitioners' keep their eight vacant lots as open space constitutes a taking. *See* App. 26a-27a (opinion of Williams, J.) (questioning whether the historic landmark designation was "little more than a cloak by which the citizens of Upper Northwest Washington have secured some parkland on the cheap").

Finally, in *Isla Verde International Holdings, Inc.* v. *City of Camas*, 990 P.2d 429 (Wash. Ct. App. 1999), the Washington Court of Appeals held that the City's requirement that the developer of a new residential community set aside 30% of the development as open space was a taking. As the court explained:

> Here, the set-aside ordinance requires Isla Verde to dedicate a significant portion of its property for a public benefit, wildlife preservation, thus limiting Isla Verde's right to improve that property. Such a governmental interference with a fundamental property right is a form of exaction. [*Id.* at 436 (citing *Lucas*).]

See also Ehrlich v. *City of Culver City*, 19 Cal. Rptr. 2d 468, 475 (Cal. Ct. App.) ("Property is generally deprived of all economically beneficial use where construction is banned entirely, such as when the property is required to remain as open space."), *review denied* (Cal. Aug. 26, 1993), *GVR'd*, 512 U.S. 1231 (1996), *in light of Dolan* v. *City of Tigard*, 512 U.S. 374 (1994).

Although it should be true as a matter of law (not to mention common sense) that requiring a property owner to

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[10] The Ninth Circuit also reaffirmed this Court's admonition that "compensation is required where regulations 'leave the owner of land without economically beneficial or productive options for its use—typically . . . by requiring land to be left substantially in its natural state.' " 95 F.3d at 1432 (quoting *Lucas*, 505 U.S. at 1018) (ellipses in *Del Monte*).

maintain his property in a completely undeveloped state as a grass lawn denies all economically productive use of the property, the record in this case—contrary to the D.C. Circuit's assertion—does support the conclusion that a *Lucas* violation occurred here. Petitioners' appraiser testified that "[g]enerally speaking, * * * lawn is not an economic use of property" and that here "the lawn has no economic value." D.C. Cir. J.A. 447. He further testified that requiring petitioners to keep the properties as a lawn actually results in an economic loss to petitioners due to taxes, insurance, and maintenance costs. *See id.* at 452. Finally, he observed that the lawn does not add to the rental income received by petitioners from Cathedral Mansions South because the apartment building is rent controlled. *See id.* ("Without the ability to increase rents, the addition of Lots 107-114 as a lawn to Lot 106 has no positive economic benefit.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 1999 Decided December 17, 1999

No. 98-7209

DISTRICT INTOWN PROPERTIES LIMITED PARTNERSHIP, ET AL., APPELLANTS

v.

DISTRICT OF COLUMBIA, ET AL., APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 96cv00569)

Before: EDWARDS, *Chief Judge*, WILLIAMS and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* EDWARDS.

Separate opinion filed by *Circuit Judge* WILLIAMS concurring in the judgment.

EDWARDS, *Chief Judge*: In 1961, District Intown Limited Properties Partnership ("District Intown") purchased Cathedral Mansions South, an apartment building and landscaped lawn on Connecticut Avenue across from the National Zoo. District Intown subdivided this property into nine contiguous lots in 1988. In March 1989, all nine lots were declared historic landmarks. In July 1992, the Mayor of the District of Columbia denied District Intown's request for construction permits to build eight townhouses on eight of the nine lots, finding that the construction was incompatible

with the property's landmark status. Alleging that the District of Columbia's denial constituted a taking, District Intown and its general partners sued under 42 U.S.C. § 1983 (1994) for just compensation under the Takings Clause of the Fifth Amendment.

Upon cross motions for summary judgment, the District Court granted summary judgment for the District of Columbia. *See District Intown Properties Ltd. Partnership v. District of Columbia*, 23 F. Supp. 2d 30 (D.D.C. 1998). The District Court held that the relevant parcel for the purposes of determining whether a taking had occurred consisted of the entire property, including the apartment building, not the eight individual lots that District Intown sought to develop. *See id.* at 35-36. The court then analyzed the alleged taking under the Supreme Court's holdings in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The District Court found that there was no categorical taking under *Lucas*, because District Intown had not been deprived of all economic value in the relevant parcel. The trial court further held that District Intown could not make out a claim under *Penn Central*, because its reasonable investment-backed expectations had not been disappointed and it continued to receive economic benefits from the property.

We hold that the District Court correctly found that the relevant parcel for the takings analysis consisted of the entire property held by District Intown, *i.e.*, the property as it was originally purchased in 1961 and as it was held for 27 years prior to the 1988 subdivision. All relevant objective and subjective factors support this conclusion. When the property is viewed as a single parcel, there is no doubt that it has not been rendered valueless. Indeed, even if each subdivided parcel is considered separately, District Intown has not shown a "total taking" under *Lucas*. In addition, the record here does not show that District Intown's investment-backed

expectations were disappointed. This is not surprising, because District Intown could not have had any reasonable investment-backed expectations of development given the background regulatory structure at the time of subdivision. Accordingly, we hold that District Intown did not present any genuine issue of material fact in support of a takings claim under *Penn Central* or *Lucas*. We therefore affirm the District Court's judgment.

I. BACKGROUND

In 1961, District Intown purchased in fee simple Lot 1 of Subdivision Square 2106 on Connecticut Avenue, across from the National Zoo. The property was known as Cathedral Mansions South and consisted of an apartment building and adjacent landscaped lawns. District Intown made no significant changes to the property until 1988, when it subdivided Cathedral Mansions South into nine lots, designated as Lots 106 through 114. The subdivisions were recorded on June 30, 1988. Lot 106 contains the apartment building, and Lots 107 through 114 are each portions of the landscaped lawn. The record indicates that District Intown spent $2,819 to survey the parcel and to record the subdivision. The record does not reflect any other expenses.

On December 30, 1988, District Intown applied for permits to build one townhouse on each of the eight landscaped lots. The zoning and structural engineering divisions of the Department of Consumer and Regulatory Affairs approved the permits on March 7, 1989. However, because the property is located across from the National Zoo, the permits were referred to the Commission on Fine Arts. *See* D.C. Code Ann. § 5-410 (1994) ("Shipstead-Luce Act"). The Shipstead-Luce Act, in effect since the 1930s, empowers the Commission on Fine Arts to communicate to the Mayor "recommendations, including such changes, if any, as in its judgment are necessary to prevent reasonably avoidable impairment of the public values belonging" to various

buildings and parks. *Id.* On March 31, 1989, the Commission on Fine Arts recommended against construction.

Beginning in 1987, before the property was subdivided, a movement developed in the Woodley Park community in support of designating the property a historic landmark. This culminated on March 2, 1989, when the group filed a landmark designation petition. This was five days before District Intown received zoning approval for the construction. The Historic Preservation Review Board ("Review Board") approved the landmark designation on May 17, 1989. Because the landmark designation petition was pending when District Intown's permits were approved for zoning, the permits were referred to the Review Board pursuant to the District of Columbia's landmark laws, *see* D.C. Code Ann. § 5-1001 *et seq.* (1994 & Supp. 1999), effective since 1979. On July 19, 1989, the Review Board recommended that the construction permits be denied. The permit applications were dismissed without prejudice on December 20, 1991.

On January 31, 1992, District Intown filed new permit applications identical in all respects to those previously dismissed. The permits were again referred to the Review Board, which recommended denial because construction on the lawn would be incompatible with its historic landmark status. Pursuant to D.C. Code Ann. § 5-1007(e), District Intown requested a hearing before an agent designated by the Mayor. The hearing was held on July 22 and 24, 1992. The Mayor's agent agreed with the Review Board, stating that "any construction destroying the lawn" would be incompatible with its landmark status. Decision and Order of Mayor's Agent ¶ 61 n.1, *reprinted in* Joint Appendix ("J.A.") 368. In addition, the agent purported to hold that the denial of the construction permits did not work an economic hardship or constitute a taking, but the District of Columbia Court of Appeals has since declared that the agent's holding was outside his jurisdiction. *See District Intown Properties, Ltd. v. Department of Consumer and Regulatory Affairs*, 680

A.2d 1373, 1379 (D.C. 1996) (decision of the Mayor's agent regarding alleged economic hardship would have no preclusive effect in any future proceeding in which District Intown might claim an uncompensated taking).

Thereafter, on March 22, 1996, District Intown filed this § 1983 action. On cross motions for summary judgment, the District Court entered summary judgment for the District of Columbia on September 25, 1998. *See District Intown Properties Ltd. Partnership*, 23 F. Supp. 2d at 39. The court found that the property (*i.e.*, the "relevant parcel") for the purposes of assessing whether a taking had occurred consisted of the original Lot 1 prior to its subdivision into nine lots. *See id.* at 35-36. Because District Intown continued to receive significant economic benefits from use of the relevant parcel, the court found that appellants failed to demonstrate that their property had been rendered "valueless," and their claim to a taking under *Lucas* failed. *See id.* at 36-37. The court then turned to the *ad hoc* analysis elucidated by *Penn Central* and found that none of the *ad hoc* factors support District Intown's takings claim. *See id.* at 37-39. This appeal followed.

II. ANALYSIS

A. *Standard of Review*

This court reviews a grant of summary judgment *de novo*. *See Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (en banc). A party is entitled to summary judgment if the record reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed R. Civ. P. 56(c). In deciding whether there is a genuine issue of material fact, the court must assume the truth of all statements proffered by the non-movant except for conclusory allegations lacking any factual basis in the record. *See Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999). Summary judgment may be granted even if the movant has proffered no evidence, so

long as the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). As the "party challenging governmental action as an unconstitutional taking," District Intown bears a "substantial burden." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998).

B. *The Takings Analysis*

The Takings Clause of the Fifth Amendment prohibits the government from taking "private property . . . for public use, without just compensation." U.S. Const. amend. V. In a regulatory takings case, the principal focus of inquiry is whether a regulation "reaches a certain magnitude" in depriving an owner of the use of property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *see also id.* at 415 (asking whether the regulation "goes too far"). The Supreme Court has indicated that most regulatory takings cases should be considered on an *ad hoc* basis, with three primary factors weighing in the balance: the regulation's economic impact on the claimant, the regulation's interference with the claimant's reasonable investment-backed expectations, and the character of the government action. *See Penn Central Transp. Co.*, 438 U.S. at 124.

The meaning of the three factors identified in *Penn Central* has been amplified by the Court, both in *Penn Central* and in later cases. The *regulation's economic effect* upon the claimant may be measured in several different ways. *See Hodel v. Irving*, 481 U.S. 704, 714 (1987) (looking to the market value of a property); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495-96 (1987) (looking to whether the regulation makes property owner's coal operation "commercially impracticable"); *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (looking to the possibility of other economic use besides sale, which was prohibited by the chal-

lenged regulation); *Penn Central Transp. Co.*, 438 U.S. at 136 (focusing on the ability to earn a reasonable rate of return). A *reasonable investment-backed expectation* "must be more than a 'unilateral expectation or an abstract need.' " *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). Claimants cannot establish a takings claim "simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." *Penn Central Transp. Co.*, 438 U.S. at 130. And the *character of the governmental action* depends both on whether the government has legitimized a physical occupation of the property, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982), and whether the regulation has a legitimate public purpose, *see Keystone Bituminous Coal Ass'n*, 480 U.S. at 485. Finally, under all three of these factors, the effect of the regulation must be measured on the "parcel as a whole." *See Penn Central Transp. Co.*, 438 U.S. at 130-31.

The Supreme Court has indicated that it will find a "categorical" or *per se* taking in two circumstances. The first circumstance includes regulations that result in "permanent physical occupation of property." *Loretto*, 458 U.S. at 434-35. This circumstance is not at issue in this case. The second circumstance includes regulations pursuant to which the government denies *all* economically beneficial or productive use of property. *See Lucas*, 505 U.S. at 1015. This so-called "total taking" claim is at the heart of District Intown's complaint here. Unfortunately, the facial simplicity of the "total taking" standard belies the difficulty in its application. As the Court acknowledged in *Lucas*, its "rhetorical force . . . is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." 505 U.S. at 1016 n.7.

Under both *Lucas* and *Penn Central*, then, we must first define what constitutes the relevant parcel before we can evaluate the regulation's effect on that parcel. In the instant case the question is: Does the relevant parcel consist of the property as a whole or do the eight lots for which construction permits were denied constitute the relevant parcels? This has been referred to as the "denominator problem." *E.g., Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994). State law may offer some guidance on how to define the relevant parcel, but, as the Court has noted, state law is not always determinative. *Compare Lucas*, 505 U.S. at 1017 n.7 (suggesting that one may look to the influence of the State's property law—whether and to what extent the State has recognized and extended legal recognition to the particular interest alleged to have been deprived of all economic value—on the claimant's reasonable expectations), *with Keystone Bituminous Coal Ass'n*, 480 U.S. at 500 (refusing to treat the support estate as a separate parcel of property simply because Pennsylvania law recognizes it as such and noting that "our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights").

C. *The Relevant Parcel*

The definition of the relevant parcel profoundly influences the outcome of a takings analysis. Above all, the parcel should be functionally coherent. In other words, more should unite the property than common ownership by the claimant. Thus, a court must also consider how both the property-owner and the government treat (and have treated) the property.

The District Court used several factors to determine the relevant parcel: the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot. *See District Intown*, 23 F. Supp. 2d at 35

(citing *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991)). An analysis focused on these factors is eminently sound and it mirrors the approach taken by other courts in regulatory takings cases. *See Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir.) (stressing the owner's treatment of property as a unit from the time of purchase), *cert. denied sub nom. RCK Properties v. United States*, 120 S. Ct. 373 (1999); *K & K Constr. Co. v. Department of Natural Resources*, 575 N.W.2d 531, 537 (Mich.) (stressing contiguity, unity of ownership, and a common development plan), *cert. denied*, 119 S. Ct. 60 (1998).

Applying these factors, the District Court correctly determined that all nine lots should be treated as one parcel for the purpose of the court's takings analysis. The lots are spatially and functionally contiguous. District Intown purchased the property as a whole in 1961 and treated it as a single indivisible property for more than 25 years. District Intown presented no evidence that, even after subdivision, it treated the lawn lots separately from Lot 106, the lot that contains the apartment building, for the purposes of accounting or management. The intentional act of subdivision is the only evidence produced by District Intown that it has treated the lots as distinct units. In fact, before the Mayor's agent, District Intown did not come forward with evidence showing that it had, for accounting purposes, treated the lawn maintenance fees separately from expenses associated with maintaining the apartment building. *See* Decision & Order of Mayor's Agent ¶ 40, *reprinted in* J.A. 364. While there is a dispute as to whether the adjacent landscaped lawn increases the apartment building's value, this is immaterial. Even if Lot 106 were deemed to have the same value with or without Lots 107 through 114, the application of the other three factors strongly suggests that Lots 106 through 114 are functionally part of the same property.

Appellants argue that the District Court was wrong to treat all the lots as a single parcel because it contradicts *Lucas* and

two Federal Circuit cases. This argument falls flat. District Intown first argues that the *Lucas* Court termed "extreme" and "unsupportable" a similar decision by the state court in *Penn Central* to treat multiple holdings as a single parcel for takings analysis. *See* Brief for Appellants at 15-16. This dictum, *see Lucas*, 505 U.S. at 1017 n.7, referred, however, only to the state court's decision to treat all of Penn Central's holdings *in the vicinity of Grand Central Station* as part of the denominator for the purposes of deciding whether plaintiffs could receive a reasonable return on their investment in Grand Central. *See Penn Central Transp. Co. v. New York*, 366 N.E.2d 1271, 1278 (N.Y. 1977). The *Penn Central* Court had no need to address this holding. The *Lucas* dictum casts aspersions on the state court's elevation of one factor, unity of ownership, over other factors in determining the relevant parcel. The District Court engaged in no such "extreme" conduct here; it did not look to all of District Intown's holdings in the vicinity of Cathedral Mansions South to evaluate the economic effect of the regulation at issue here; it looked to contiguous property that was purchased and treated as a single unit by appellants.

Similarly, the two Federal Circuit cases cited by District Intown do not undermine the District Court's definition of the relevant parcel. *See* Brief for Appellants at 16 (citing *Loveladies Harbor*, 28 F.3d at 1171 and *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986)). Neither of these cases support appellants' position and, in fact, *Loveladies Harbor* supports the District Court's decision. In *Florida Rock Industries*, the court reviewed the Army Corps of Engineers' uncompensated rejection of the plaintiff's application to mine limestone on 98 acres of the plaintiff's wetland property. *See Florida Rock Indus.*, 791 F.2d at 896. The Federal Circuit affirmed the trial court's decision to consider the 98 acres as the relevant parcel separate from the adjacent 1,462 acres of wetland. *See id.* at 904. The Federal Circuit's justification for this decision, however, was that all

the evidence and the findings indicated that the Army Corps of Engineers would have rejected mining on all of the property, so there was no point to including all 1,560 acres in the relevant parcel. *See id.* at 904-05. Thus, *Florida Rock Industries* is not analogous to the instant case; there is no indication that the District of Columbia will prevent District Intown from continuing to use its property to obtain income from its apartment building.

Loveladies Harbor lends support to the District Court's decision to treat Lots 106-114 as one parcel. The plaintiff in *Loveladies Harbor* sought to develop a total of 12.5 acres of land, consisting of 11.5 acres of wetlands and one acre of filled upland. *See Loveladies Harbor*, 28 F.3d at 1180. The Army Corps of Engineers refused to grant the permit required to fill the wetlands acreage. *See id.* at 1174. In reviewing whether this denial constituted a taking the Federal Circuit found that the trial court correctly concluded that the relevant parcel was the entire 12.5 acres, not just the 11.5 acres to which the permit denial applied. *See id.* at 1181. Thus, *Loveladies Harbor* argues against treating the property burdened by the regulation separately from contiguous property.

Moreover, the *Loveladies Harbor* Court emphasized that a "flexible approach, designed to account for factual nuances," guides its analysis of the denominator problem. *Id.* These factual nuances include "whether there remained substantial economically viable uses for plaintiff's property after the regulatory imposition," *id.* (citing *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981)), and "the timing of transfers in light of the developing regulatory environment." *Id.* Both of these factors support our conclusion in the instant case that Cathedral Mansions South as a whole constitutes the relevant parcel.

Finally, *Penn Central* is instructive where, as here, appellants own a single piece of property that is divisible into

several legally recognized entities. Indeed, the Court was rather blunt in saying that

> "[t]aking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.

Penn Central Transp. Co., 438 U.S. at 130. The Court also made it clear that a party may not "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest they heretofore had believed was available for development." *Id.* The Court found this suggestion to be "simply untenable." *Id.*

On the basis of the foregoing authority, it seems clear here that we must analyze District Intown's property not as separate, potentially divisible and transferable parcels, but as one contiguous parcel. Appellants note that the District of Columbia has taxed Lots 107 through 114 at a higher rate since subdivision, reflecting the District of Columbia's assessment that these lots are vacant developable land. They contend that it is inconsistent for the District of Columbia to speak from both sides of its mouth in this regard, claiming for tax purposes that the lots are developable, but refusing to permit development on the lots. We simply note that appellants retain the right to recombine the parcels and treat them as one property for the purposes of taxation, so no further disadvantage will befall them on this score.

We are perplexed by our concurring colleague's criticism of our approach to evaluating a takings claim. As the concurring opinion correctly notes, at bottom, the approach that we follow and the result that we reach are in accord with Supreme Court case law. Unless and until the Court instructs otherwise, we are obliged to judge within the bounds of established precedent.

D. *Analysis Under* Lucas

Given that Lots 106 through 114 should be treated as a single parcel, the District Court's denial of summary judgment on District Intown's *Lucas* claim is unremarkable. To come within *Lucas*, a claimant must show that its property is rendered "valueless" by a regulation. *Lucas*, 505 U.S. at 1009. District Intown presented no evidence to show that the regulation deprived the property as a whole of all economically beneficial use.

Even were we to view Lot 106 as distinct from Lots 107 through 114, it seems plain that the District Court should have granted appellees' motion for summary judgment. Drawing all inferences in favor of District Intown, the record does not support the conclusion that Lots 107 through 114 are rendered "valueless" by the regulation at issue. The record contains a finding by the Mayor's agent that any construction that destroyed the lawn would be incompatible with the lawn's status as a historic landmark. *See* Decision & Order of Mayor's Agent ¶ 61 n.1, *reprinted in* J.A. 368. District Intown argues from this that its case fell on all fours within *Lucas*. District Intown seeks to extend *Lucas* beyond its reach. The *Lucas* Court consciously recognized that it was drawing an arbitrary line between total destruction of economic value and something marginally less than total destruction. *See* 505 U.S. at 1019 n.8 (pointing out that while the line establishing a categorical deprivation as requiring a complete diminution in value is arbitrary as it relates to someone who only suffers a 95% deprivation in value, the person whose deprivation is "one step short of complete" may still seek compensation under the *Penn Central* balancing test). District Intown propounded no evidence that the lawns' economic value was totally destroyed as is required by *Lucas*, nor did District Intown offer evidence of the plots' fair market value after its construction permits were denied. *Cf. Florida Rock Indus.*, 791 F.2d at 905 (reversing the trial court's finding that denial of permit

constituted an uncompensated taking because the court failed to consider the property's fair market value after regulation).

The concurring opinion misconstrues the opinion for the court when it suggests that, pursuant to our analysis, no compensable taking could ever be found. As noted in the foregoing discussion, we simply intend to highlight the limited nature of the *Lucas* inquiry, and note that there would be no "categorical" taking even were we to view the parcels as separate under *Lucas*. We do not pass on how the parcels would fare separately under *Penn Central*'s *ad hoc* analysis.

E. *Analysis under* Penn Central

There are three main factors to be considered in *Penn Central*'s *ad hoc* inquiry: the character of the government action, the regulation's economic effect on the claimant, and the effect on investment-backed expectations. District Intown does not appear to argue that the character of the governmental action counsels finding a taking; this is not a permanent invasion, but rather a general regulation with a legitimate public purpose. As to the economic effects, District Intown offered no evidence that this regulation rendered Lots 106-114 unprofitable to maintain; there is nothing in the record to suggest that the apartment building does not bring in a sufficient return for District Intown, and a claimant must put forth striking evidence of economic effects to prevail even under the *ad hoc* inquiry. *See Penn Central Transp. Co.*, 438 U.S. at 131 (reviewing the Court's decisions upholding regulations despite diminution in a property's value of more than 75%).

Finally, District Intown did not present sufficient evidence that it had a reasonable investment-backed expectation to develop the lawns into apartment buildings. Here, as in *Penn Central*, the regulation does not interfere with District Intown's "primary expectation" concerning the use of the parcel, because it "not only permits but contemplates that appellants may continue to use the property precisely as it

has been used" for the past 28 years. *Penn Central Transp. Co.*, 438 U.S. at 136.

District Intown suggested at oral argument that it has satisfied the requirement of demonstrating reasonable investment-backed expectations because it purchased property that, at the time of purchase, was subdividable. This is not sufficient to establish the existence of reasonable investment-backed expectations. In this case, where the development District Intown proposes departs from the property's traditional use, and the moment of purchase is so attenuated from the moment of subdivision, the claimant surely must point to some action beyond mere purchase to establish the reasonableness of its expectations.

Appellants also argue that their expectations of the property's use between the moment of purchase and the moment of subdivision could have reasonably changed. This may be, but when appellants subdivided they surely knew that the legal regime had changed since they first bought their property. Moreover, they knew that any subdivided parcel would be subject to that regime. *Lucas* teaches that a buyer's reasonable expectations must be put in the context of the underlying regulatory regime. *See* 505 U.S. at 1030 (stating that the Takings Clause does not require compensation when the restriction is proscribed by background state law rules or understandings). District Intown purchased and subdivided its property subject to an existing regulatory regime that establishes that District Intown could have had no reasonable expectations of development at the time it made its investments.

At the time of purchase, District Intown could have reasonably expected the Shipstead-Luce Act to affect its rights of development. For approximately 60 years, the Shipstead-Luce Act has restricted development on properties that, like Cathedral Mansions South, abut or border upon the National Zoo. *See* D.C. Code Ann. § 5-410. Were that not sufficient,

after 1979, D.C.'s historic landmark laws additionally limited expectations of development. *See id.* § 5-1001 *et seq.* Thus, at the time District Intown subdivided the property, it knew, or should have known, that the property was potentially subject to regulation under the landmark laws. *Cf.* Amicus Curiae Brief at 15 (pointing out that almost the entire length of Connecticut Avenue from M Street to almost a mile north of District Intown's property is either landmarked or within a historic district). Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative ends. *See Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993). In this case, District Intown was in the real estate business, with a history of restriction of development for the purpose of preserving historic sites. Similarly, the Supreme Court rejected a company's claim of reasonable expectations that the Environmental Protection Agency would maintain trade secret confidentiality where the industry had long "been the focus of great public concern and significant government regulation" and the "possibility was substantial that the Federal Government . . . would find disclosure [of trade secrets] to be in the public interest." *Monsanto Co.*, 467 U.S. at 1008-09. Prior to and after subdivision, this particular property was the subject of increasing public activity devoted to restricting development through landmark designation. *See Good v. United States*, 189 F.3d 1355, 1361-63 (Fed. Cir. 1999) (finding the claimant had no reasonable expectations where he purchased the land subject to environmental regulation and watched as public concern for the environment increased and the applicable regulations became more stringent before seeking approval for development).

District Intown also argues that the District Court's finding that the regulation did not have a significant economic impact was erroneous. District Intown bases this argument on the assertion that they presented undisputed evidence that

the lawns, absent development, add nothing to the value of the apartment building. *See* Brief for Appellants at 24-25. This argument misunderstands the substantial burden District Intown faced in District Court. District Intown had to produce evidence showing that its entire property, including Lot 106, no longer provided a reasonable rate of return given the D.C. regulation. Whether the lawns add value to the apartment building is irrelevant to whether the property as a whole can be operated at a sufficient profit even with the regulation. In short, none of the *Penn Central* factors support District Intown's claim of a compensable deprivation of property.

III. CONCLUSION

For the reasons stated above, we affirm the District Court's grant of summary judgment in favor of the District of Columbia.

So ordered.

WILLIAMS, *Circuit Judge*, concurring in the judgment: The District of Columbia's Historic Preservation Board imposed historic landmark status not only on an apartment building named Cathedral Mansions South but also on a substantial stretch of adjacent lawn bordering the sidewalks of Connecticut Avenue. District Intown, the owner of both, claims that as applied to the lawn the landmarking effects a taking of its property in violation of the Takings Clause of the Fifth Amendment. The majority's disposition is—with one important exception—in general accord with the current opinions of the Supreme Court. Those decisions are of course binding. At the same time, however, it is not inappropriate to identify ways in which the prevailing analysis elevates formal concepts over economic reality and tends to strip the Clause of its potential for fulfilling the framers' likely purposes.

The economist's justification for the Takings Clause is that it provides a check on government's likely tendency to waste resources by treating private property as a free good. See Richard A. Posner, Economic Analysis of Law 58 (4th ed. 1992) ("The simplest economic explanation for the requirement of just compensation is that it prevents the government from overusing the taking power."). This is just an application of the general principle that if a firm can externalize costs (e.g., the health costs of polluting the air), it will use more of the unpriced resource (in this example, air as a waste sink) than it would if required to pay. And it will tend to overproduce the goods or services whose production uses the superficially "free" good—i.e., it will produce them at a level where the true value of the extra inputs exceeds the true value of the extra output. See generally Robert Cooter & Thomas Ulen, Law and Economics 45-46 (1988). As applied to government regulation, similar oversupply can be expected—here, production of regulations that impose more costs than they afford benefits, that do more harm than good.

The framers, though not articulating the purpose of the Clause in economic terms, evidently did view it as aimed at correcting the incentives of the political branches. There is evidence, for example, that James Madison saw electoral power slipping into the hands of a non-landholding majority, which in a "leveling" mode could be expected to invade landowners' rights. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 849 (1995). Late twentieth century America, of course, displays a far greater range of purposes than "leveling" for reallocation of rights. While the resulting proposals are naturally advanced in the name of the public good, many are surely driven by interest-group purposes, commonly known as "rent-seeking." Among these proposals, at least some inflict aggregate costs considerably outweighing their aggregate benefits, paralleling the wasteful production associated with private firms'

externalization of costs. The Takings Clause serves to curb such inefficiencies. See, e.g., Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 281 (1985) ("[T]he Takings Clause is designed to control rent seeking and political faction. It is those practices, and only those practices, that it reaches.").

A Takings Clause construction that was dedicated *without qualification* to preventing such government externalization would require compensation whenever regulation reduced the value of anyone's property, however slightly. Balanced against that goal is an array of considerations. Most obvious is the cost of calculating and administering compensation, which would tend to sink many a beneficent statute. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). (The compensation cost itself would be only a weak countervailing factor, for most beneficent regulation would presumably generate gains large enough to pay the losers if identification and calculation were costless.) My goal here is not to pinpoint the appropriate balance between these competing considerations, much less to suggest that the correct reading is one under which all regulation materially adversely affecting a property's value would be compensable. Rather, it is simply to note the ways in which modern interpretation of the Takings Clause, as exemplified in today's decision, impairs its role as a disincentive to wasteful government activities.

* * *

The majority applies an apparent presumption that contiguous parcels under common ownership should be treated as one parcel for purposes of the takings analysis. This presumption tends to reduce the likelihood that courts will order compensation. The larger the parcel, the greater the chance

that the regulated land will retain an economically viable use. Where no such use remains, there is a "total taking" and the government can "resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with," *Lucas*, 505 U.S. at 1027; where an economically viable use survives regulation, the best the owner can hope for is "partial" takings analysis. Under the latter courts will determine whether to award compensation by looking to "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action," *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); see also *Eastern Enters. v. Apfel*, 118 S. Ct. 2131, 2146 (1998); *Lucas*, 505 U.S. at 1019 n.8, and will generally deny compensation so long as the restriction "substantially advance[s] legitimate state interests," *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); see also *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). Few regulations will flunk this nearly vacuous test. In fact, the Supreme Court has only once found a partial taking to be compensable, and even then only a plurality applied the partial takings analysis. *See Eastern Enters.*, 118 S. Ct. at 2149; see also *id.* at 2154-60 (Kennedy, J.) (rejecting the plurality's takings analysis and finding invalidity on other grounds).

The Supreme Court has offered several justifications for this distinction between partial and total takings. See, e.g., *Lucas*, 505 U.S. at 1017-18 (suggesting that "from the landowner's perspective," a total taking is tantamount to a physical taking, and that from the government's perspective the concern that an obligation to compensate for any incidental value diminution would impede effective functioning cannot apply in the "relatively rare situations" of total takings). From the perspective of ensuring that the government not engage in wasteful behavior, however, the focus on the uses of the land that *remain* is misplaced: "[W]hat is

decisive is that which is taken, not that which is retained." Epstein, Takings, *supra*, at 58. Whether the landowner is left with a limited use of the land or none at all is hardly relevant to that issue. And as the regulating government delineates the scope of regulation, the opportunity for strategic behavior is obvious.

The majority's cursory application of the *Penn Central* factors further broadens the gap between the two modes of analysis, reinforcing the seemingly predetermined conclusion: in partial takings cases, the government wins. The majority states that District Intown has not shown the land "unprofitable to maintain," Maj. Op. at 14; it is unimaginable, however, absent an extraordinary tax liability, that a parcel could retain an economically viable use yet have a net negative value. The majority goes on to say that District Intown has failed to show that the land does not "bring in a sufficient return," *id.*, but does not answer the all-important question: a return on what? on out-of-pocket costs? on initial purchase price? on fair market value? Moreover, the majority provides no guidance as to how "sufficient" the return must be, except to cite *Penn Central*, in which the Court found that a 75% diminution in value did not constitute a compensable taking. See *id.*

Similarly, in its consideration of District Intown's "reasonable investment-backed expectations," the majority's analysis begs the question whether any landowner, in a world where zoning regulations are prevalent, could ever argue that a particular regulation was "unexpected." The presumption is insurmountable: "Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative needs." Maj. Op. at 15. Although the 1931 Shipstead-Luce Act might have put District Intown on notice that some regulation of architectural design might be expected, it is farfetched to conclude that District Intown, merely because of its proximity to the zoo, should reasonably

have anticipated an absolute ban on construction; the city's counsel, under questioning at oral argument, failed to identify any uses, or even attempted uses, of the Shipstead-Luce Act to support a complete construction veto. Although the Takings Clause is meant to curb inefficient takings, such a notion of "reasonable investment-backed expectations" strips it of any constraining sense: except for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. Thus regulation begets regulation.

Although the presumption in favor of looking at the parcel as a whole, and in turn the increased reliance on the partial takings mode of analysis, is at odds with the underlying principle of the Takings Clause, it is perhaps the best construction of the Supreme Court's limited guidance. The Court has never squarely addressed the question of how courts should define the relevant geographic parcel of land, also known as "horizontal severance." Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 705 (1996). In *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Court considered whether the city council had effectuated a taking of plaintiff's land by zoning as "residential" a 100-foot strip on plaintiff's 140,000 square foot parcel. Although the Court appeared to treat the relevant parcel as encompassing only the fractional strip, this was in no respect relevant to the Court's decision. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Court applied a very weak form of horizontal severance, focusing exclusively on the landmarked building itself without treating the owner's neighboring—but not adjacent—property as part of the greater parcel, as had the New York Court of Appeals. *See Penn Central Transportation Co. v. New York City*, 366 N.E.2d 1271, 1276-77 (N.Y. 1977). But *Penn Central* tells little, as the properties were not all contiguous, had been put to different uses, and had

never been treated as a unified whole by the owners or the City.

Penn Central's handling of "vertical severance," however, is informative, if only by analogy. Using language seemingly broad enough to encompass horizontal severance, the Court made clear that it would not consider the air rights above Grand Central separately from the land rights: " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 U.S. at 130; see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496-502 (1987) (refusing to regard either coal that statute required miners to leave in place (about 2% of total coal), or the "support estate," as distinct property for ascertaining whether statute denied owners all economically viable uses).

The Court has expressed similar reluctance to engage in "conceptual severance" more generally (i.e., the treatment of any specific property right as a single unit). In *Andrus v. Allard*, 444 U.S. 51 (1979), the Court refused to treat extinction of the right to sell any part of a lawfully killed bald eagle as a total taking. *See id.* at 65-66 ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). The Court arguably evidenced a retreat from this strong position in *Hodel v. Irving*, 481 U.S. 704, 717-18 (1987), in which it found a taking in legislation that "completely abolished" certain landowners' rights to dispose of their property by descent or devise, even though they retained complete rights to possess and to make inter vivos transfers. The Court has not, however, reached agreement on the scope of this retreat. Compare *id.* at 719 (Scalia, J., concurring) (saying the decision "effectively limits *Allard* to its facts"), with *id.* at 718 (Brennan, J., concurring) (saying that the case was "unusual" and thus had no impact on *Allard*). Overall, I think the

majority is correct in its implicit understanding that the Supreme Court is reluctant to carve a landowner's parcel into smaller units for which compensation might be more likely.

But the factors that the majority applies in making the decision, drawn from decisions of the Federal Circuit and Claims Court and characterized by the majority as "eminently sound," Maj. Op. at 9, strike me as uninformative and largely irrelevant. The factors considered are: (1) whether the neighboring parcels are contiguous, (2) whether they were acquired simultaneously, (3) whether they have been treated as a single unit, and (4) the extent to which the restricted lot benefits the neighboring lot. Maj. Op. at 8-9.

The first factor, contiguity, is clearly necessary but in no way sufficient. The next two factors—simultaneity of acquisition and unity of use—are more troublesome. Both elevate history—either the historical purchase or the historical use—over the real-world present relationship between the tracts. Compare Laura M. Schleich, *Takings: The Fifth Amendment, Government Regulation, and the Problem of the Relevant Parcel*, 8 J. Land Use & Envtl. L. 381 (1993) (proposing that courts look to the "moment of regulation" when defining the relevant parcel). The majority's focus on the property's use prior to regulation tells us nothing about the value-producing opportunities foreclosed at the time of regulation. "It is, of course, irrelevant that [the government] interfered with or destroyed property rights that [plaintiff] had not yet physically used. The Fifth Amendment must be applied with 'reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, *or such as may be reasonably expected in the immediate future*.' " *Penn Central*, 438 U.S. at 143 n.6 (Rehnquist, J., dissenting, quoting *Boom v. Patterson*, 98 U.S. 403, 408 (1879)).

The majority mentions but brushes aside a fourth factor—the extent to which the regulated parcel benefits the neigh-

boring lot. Maj. Op. at 9. Yet this appears the most relevant. The more a burdened tract in its regulated use benefits contiguous property, the less likely that the regulation has a net negative impact. In the extreme case a property interest may be worthless except in conjunction with another. Thus in *Keystone Bituminous Coal Ass'n*, the Court pointed out that the "support estate" had "value only insofar as it protects or enhances the value of the estate with which it is associated [i.e., the mineral estate]," 480 U.S. at 501, and therefore refused to treat the "support estate" as a separate interest at all. Similarly, small parcels of land, either in the interior or around the edges of greater parcels, commonly are valuable only when they combine with the greater parcel to create a more valuable whole; for regulation of the exterior (such as setback requirements), then, it makes sense to measure the impact in conjunction with the "primary" parcel. Looking to the property owner's benefit from these internal synergies parallels use of "average reciprocity of advantage," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), which considers the benefit that each burdened owner—as in ordinary zoning or historic districting—receives from the similar restriction of his neighbors.

Of course there will be some synergy between almost any two neighboring parcels under common ownership, since unified ownership creates options for the sole owner that multiple landowners could achieve only by contracting. But synergy is a matter of degree, and mere contiguity should not be enough. One commentator proposes a rather demanding synergy test, arguing that the regulated tract should be considered as its own parcel so long as not all of its value derives from synergies with neighboring land; in such cases, the parcel would have an independent economically viable use, which if destroyed by regulation would be compensable under *Lucas*. See John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L.

Rev. 1535, 1557-58 (1994). One need not go so far to see the skimpiness of the synergy here.

To be sure, Cathedral Mansions is more than several contiguous parcels. According to the decision of the Historic Preservation Review Board, "The buildings are sited imaginatively to provide the greatest possible integration of living space with well-landscaped open space." Joint Appendix ("J.A.") 320. (Passersby who observe the rather bare lawn will have to reach their own judgments on the adjective "well-landscaped.") Integration there doubtless is—almost any lawn around a building will manifest a degree of integration. But there is no explicit showing that these synergies depend on the *entire* lawn remaining undeveloped. The proposed townhouses would cover only the portion of the lawn abutting Connecticut Avenue, still leaving the interior portion, approximately half the lawn, undeveloped. Common sense would suggest that at some distance from the building marginal synergies created by extra lawn space become slight, and thus that the part of the lawn beyond that line should be treated as its own parcel for takings purposes. Further, although District rent-control law evidently allows the owner to earn a return on the tax-assessed value of land in a single tract with a rent-controlled building (here the owner could apparently recover that status by undoing the formalities of subdivision), that value is likely to be only a tiny fraction of the value absent the historic landmarking.

In fact, it may well be completely different synergies —ones between the lawn and adjacent Connecticut Avenue —that have driven the landmarking decision. The Board observed that the lawn "contributes significantly to the unique open space character of Connecticut Avenue." J.A. 320. A cynic might suspect that the alleged relationship between the lawn and the Cathedral Mansions apartments is little more than a cloak by which the citizens of Upper Northwest Washington have secured some parkland on the

cheap. Parks are good, but the Fifth Amendment says that taking them is not.

Of course, there is another synergy between the two parcels and adjacent Connecticut Avenue, namely the historical value that inheres in the preservation of a building as it was initially constructed (i.e., with an expansive lawn beside it). Uncompensated landmark preservation seems to rest on this synergy. The Court in *Penn Central* embraced the view that "the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole." 438 U.S. at 134. This broad language seems to redefine "reciprocity of advantage" in such a way that no government act could ever require compensation, as the afflicted owner would be a member of the taking polity and thus in receipt of offsetting advantages, artificially presumed to be adequate.

Apart from obliterating takings law, such a view has peculiarly perverse effects in the realm of historic preservation. Although such laws try to preserve for society the positive externalities created by buildings like Cathedral Mansions, inflicting the entire cost on the creator of the landmark (or his successor in interest) is bound to discourage investment in first-class design. Moreover, while insurance markets can achieve the risk-spreading (or anti-"demoralization") goals that some attribute to the Takings Clause, compare Posner, Economic Analysis of Law, *supra*, at 58, they cannot offset non-compensation's disincentive to good design. Historic landmark preservation, after all, is imposed selectively on those who went out of their way to secure architectural distinction. The higher the quality, the higher the premium for takings insurance; the disincentive is inescapable.

Having found that the lawn and apartment parcels should be treated as a unit, the majority nevertheless considers whether compensation would be due even if the lawn were analyzed separately; in doing so, it gratuitously takes an even

harsher stance against compensation than does present law. The majority finds that District Intown has failed to offer evidence that the regulation denies it "economically viable use of [the] land," *Lucas*, 505 U.S. at 1016, even though the Mayor's own agent found that "any construction that destroyed the lawn would be incompatible with the lawn's status as an historic landmark." Maj. Op. at 13. Thus, so long as the lawn is untouched, "economically viable" uses are permissible. It is hard to imagine what "economically viable" use that constraint leaves, unless the majority means that the very barest thread of value, yielded by some thoroughly bucolic use, is enough to defeat a total takings claim. By this standard, no regulation can ever effect a total taking, and at best will be tested only under the far weaker partial takings rubric.

* * *

The prevailing Federal Circuit-Claims Court method of defining the relevant parcel, followed by the panel here, focuses on marginal issues and largely overlooks the more critical concern of synergies; the focus on the landowner's historical, rather than proposed, use further skews the analysis. But the Supreme Court's general approach seems to militate in favor of looking to the parcel as a whole. Similarly, although resting uncompensated landmark preservation on the idea of reciprocal advantage stretches the concept into meaninglessness, and the denial of compensation discourages ex ante what it hopes to foster ex post, the current cases give these arguments little purchase. Accordingly, I concur in the majority's decision to affirm.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 96-569-LFO

DISTRICT INTOWN PROPERTIES LIMITED PARTNERSHIP, ET AL.,
PLAINTIFFS,

v.

DISTRICT OF COLUMBIA, ET AL., DEFENDANTS

MEMORANDUM

Plaintiffs, a limited partnership and its partners, bring this action under 42 U.S.C. § 1983 on the ground that the District of Columbia has taken their property without just compensation. The undisputed facts are that in 1961 plaintiffs purchased in fee simple Lot 1 of Subdivision Square 2106 (hereinafter "Lot 1"). Known as Cathedral Mansions South, Lot 1 consisted of an apartment building and adjacent landscaped lawns. Cathedral Mansions South was built by local developer Harry Wardman in the early 1920s as part of his larger Cathedral Mansions project. Defendants assert, and plaintiffs do not contest, that Lot 1 was maintained by plaintiffs and their predecessors as a single taxable lot from 1922 until 1988. At that time, twenty-seven years after they purchased Lot 1, plaintiffs caused it to be subdivided and recorded as separate lots: Lot 106, which included the improvements on the original site, and eight smaller contiguous lots (Lots 107-114) carved out of the landscaped lawn.

In December 1988, following the subdivision, plaintiffs applied for building permits to construct one single-family townhouse on each of Lots 107-114. On February 14, 1989, plaintiffs' applications were referred to the United States Commission of Fine Arts ("Commission"), as a portion of Cathedral Mansions South faces the Zoological Park, a

federal property protected by the Shipstead-Luce Act. *See* D.C. Code § 5-410 (1994) (effective May 16, 1930). The Commission ultimately recommended disapproval of the applications for reasons both practical and aesthetic. *See* Pls.' Mot. for Summ. J. Ex. B-4.

On March 2, 1989, while plaintiffs' permit applications were still pending, an application was filed with the District of Columbia Historic Preservation Review Board ("Board") to designate as an historic landmark the entire Cathedral Mansions complex, including Lots 106-114. Under D.C. Code § 5-1002(6)(B), properties for which historic landmark applications are pending are treated as landmarks for purposes of the Historic Landmark and Historic District Protection Act of 1978, D.C. Code § 5-1001 *et seq.* (the "Landmark Act"). Accordingly, on March 7, 1989, plaintiffs' applications were referred to the Board for review and recommendation.[1]

On May 17, 1989, the Board acted on the landmark application, voting to designate Cathedral Mansions, including Lots 106-114, as an Historic Landmark in the District of Columbia Inventory of Historic Sites. It described the complex as containing three Georgian Revival style buildings

> sited imaginatively to provide the greatest possible integration of living space with well-landscaped open space. Individual apartments were designed where possible to

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[1] Plaintiffs repeatedly assert that "zoning approval" was obtained on March 7, 1989, the date on which their applications were forwarded to the Board. However, the transmittal letters to the Commission, Pls.' Mot. for Summ. J. Ex. B-2, indicate that "zoning approval" and "structural approval" were certified as early as February 15, 1989. Plaintiffs' emphasis to the contrary, it is not clear from their evidence that "zoning approval" of this type has any significance, apart from the fact that it is one of numerous considerations that determine whether a building permit will be issued.

> include multiple exposures with large areas of fenestration, sun rooms and French doors opening onto sheltered patios and balconies. Cathedral Mansions is designed in the context of Connecticut Avenue and nearby parkland including the National Zoo and the Rock Creek and Klingle Valley ravines. It contributes significantly to the unique open space character of Connecticut Avenue in which single family and multi-family residences complement each other and are integrated and enhanced through a continuity of designed and natural landscape.

Pls.' Mot. for Summ. J. Ex. B-5 at 1. In support of its landmark designation, the Board noted that Cathedral Mansions was "an early and fine example of a large apartment complex in a park-like setting" and a "notable work of Harry Wardman, one of the most prolific and influential developers of residential property in the history of the District of Columbia." *Id.* at 2.

In July 1989, the Board held a hearing on plaintiffs' building permit applications, and recommended that they be denied on grounds that the "construction of eight new townhouses on the open space is not consistent with the purposes of Section 2(b) of D.C. Law 2-144, Historic Landmark and Historic District Protection Act of 1978." Pls.' Mot. for Summ. J. Ex. A-12. Plaintiffs initially sought a hearing before the Mayors Agent to review the Board's decision; however, their permit applications were dismissed without prejudice by the Mayor's Agent in an "Uncontested" Decision and Order of December 20, 1991.

In January 1992, plaintiffs once again submitted applications for permits to build townhouses on Lots 107-114. Upon referral, the Board again denied plaintiffs' applications as inconsistent with the landmark status of Cathedral Mansions. On March 8, 1993, the Mayor's Agent affirmed the Board's decision, and signed an order denying plaintiffs' building permit applications, concluding that the proposed

construction was incompatible with the Cathedral Mansions landmark because it "would result in the destruction" of the lawn, which is "an integral part of the landmark."[2] Pls.' Mot. for Summ. J. Ex. B-1 at 12.

In the instant action, plaintiffs do not contest the decisions of the Board or the Mayor's Agent. Nor do they challenge the Historic Landmark and Historic District Protection Act itself. Rather, they assert pursuant to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that defendants have effected a "total taking" of their property—or more specifically, of Lots 107-114—for which they are entitled to just compensation. Defendants assert that no taking has occurred because plaintiffs failed to exhaust their administrative remedies and because they have not been deprived of all economic benefit from the property. Pending are cross-motions for summary judgment.

I.

Before a regulatory taking claim brought against a state entity is ripe for decision in federal court, the claimant must demonstrate that: (1) the responsible state agency has made a final decision as to "application of the [challenged] regulation to the property at issue"; and that (2) the claimant has "sought" compensation through available state procedures.

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[2] On April 21, 1993, plaintiffs petitioned the District of Columbia Court of Appeals to vacate certain findings made by the Mayor's Agent. Plaintiffs conspicuously failed to challenge the actual denial of the applications or to demand the issuance of permits; accordingly, the Court of Appeals dismissed the complaint on grounds that plaintiffs had not created a justiciable case or controversy. *See District Intown Properties, Ltd. v. District of Columbia Dep't of Consumer and Regulatory Affairs*, 680 A.2d 1373 (D.C. 1996). The Court of Appeals held, however, that findings of the Mayor's Agent concerning economic hardship were made *ultra vires*, thus voiding them of preclusive effect in any subsequent litigation.

See Suitum v. Tahoe Reg'l Planning Agency, 117 S.Ct. 1659, 1664-65 (1997); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). Defendants, in effect, contend that plaintiffs satisfied neither prerequisite because they "elected to by-pass" procedures that would have permitted the Mayor's Agent to consider plaintiffs' claims of economic hardship prior to issuing his final order. *See* Defs.' Mot. for Summ. J. at 12. Defendants' contention is not supported by governing District of Columbia law.

The Landmark Act contains separate provisions concerning applications for "Demolitions," "Subdivisions," "Alterations," and "New construction" within an historic district or on the site of an historic landmark; at issue here is which of the latter two categories properly described plaintiffs' applications. When they sought review by the Mayor's Agent, plaintiffs invoked the provision governing "New construction," which applies to permits "to construct a building or structure in ar historic district or on the site of an historic landmark." D.C. Code § 5-1007 (1994). Defendants argue that plaintiffs were equally entitled to invoke the procedures for "Alterations," D.C. Code § 5-1005, since construction of new townhouses on the landscaped lawn would inevitably "alter" the Cathedral Mansions historic landmark site.[3] Defs.' Reply at 4.

The distinction is more than semantic. Under D.C. Code § 5-1007, the Mayor's Agent was required to issue plaintiffs' building permits unless he found the proposed construction to be "incompatible" with the character of the landmark. Under D.C. Code § 5-1005, however, the Mayor's Agent could have issued the permits over the objections of the Board if he found the proposed alterations to be "necessary in

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[3] While defendants' motion refers to lots 107-114 as the *site* of the Cathedral Mansions landmark, they were, in fact, designated as *part* of the landmark. *See* Pls.' Mot. for Summ. J. Ex. B-5.

the public interest," or if failure to issue the permits would result in "unreasonable economic hardship to the owner." The legislative history of the Landmark Act indicates that the "unreasonable economic hardship" test of § 5-1005 was "designed to embody the constitutional standard [for a taking] as defined by the United States Supreme Court." *See* Report of the Committee on Housing and Urban Development, Council of the District of Columbia, on Bill 2-367 (Law 2-144) (October 5, 1978) at 6, 11.[4]

The administrative record in this case reflects considerable confusion among the parties as to whether plaintiffs' project was better described as an "alteration" or "new construction," and as to the applicable standard of review in either case. These issues, however, need not be resolved here. While defendants argue that plaintiffs *could have elected* to characterize their project as an alteration, they do not argue that plaintiffs were *precluded* from characterizing it as "new construction" and proceeding in accordance with § 5-1007. In fact, when the issue was raised by plaintiffs' representative at the first Board hearing in 1989, the Board Chairman stated: "[I]t's our understanding that alterations pertain more to structure as opposed to the land, and so, the application is properly filed under new construction. So it didn't require that you request alteration or even demolition, for that matter." Historic Preservation Board Tr., 7/19/89, at 148-49.

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[4] The Council Committee that reported the bill offered no explanation why the "unreasonable economic hardship" test was adopted for purposes of an alteration permit and not for purposes of a new construction permit; however, the report indicates that the test was explicitly developed to conform with the then-recent Supreme Court decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which involved an application for alteration of an historic landmark. *See* Report of the Committee on Housing and Urban Development, Council of the District of Columbia, on Bill 2-367 (Law 2-144) (October 5, 1978) at 6.

When plaintiffs were informed by defendants of the Board's second "do not issue" recommendation, that notification characterized plaintiffs' project as "New [c]onstruction." *See* Defs.' Reply Ex. C. Unsurprisingly, plaintiffs requested review by the Mayor's Agent pursuant to the regulations governing permits for new construction, rather than alteration. *See* Defs.' Reply Ex. B. Although plaintiffs were invited—but ultimately declined—to present evidence of "economic hardship" to the Mayor's Agent, as would have been appropriate in a proceeding under § 5-1005, *see* March 8, 1993 Decision & Order, Pls.' Mot. for Summ. J. Ex. B-1 at 12-13, this did not change the character of the proceeding, which was a review of a permit for new construction pursuant to § 5-1007. *See District Intown Properties, Ltd. v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 680 A.2d 1373 (D.C. 1996). Once the Mayor's Agent issued his final order denying their permits, plaintiffs exhausted their administrative remedies under § 5-1007: "A developer who claims that the denial of a permit for new construction constitutes uncompensated taking of his property is free to bring an action against the District for damages, and thus has a readily available legal remedy." *Id.* at 1379.

Finally, even if plaintiffs had elected to proceed under § 5-1005, defendants have failed to demonstrate how that section would provide plaintiffs with a *remedy* for the denial of their building permits. Even if they successfully demonstrated "unreasonable economic hardship," § 5-1005 would merely authorize, but not require, the Mayor's Agent to issue the permits over the objections of the Board. *See* D.C. Code § 5-1005(f) ("no permit shall be issued unless the Mayor finds that such issuance is necessary in the public interest or that a failure to issue a permit will result in unreasonable economic hardship to the owner." And § 5-1005 provides no mechanism for compensating a property owner if the Mayor's

Agent declines to issue an alteration permit despite "unreasonable economic hardship."

For the reasons stated above, the record indicates that plaintiffs have exhausted all available avenues of administrative review, that a final decision has been issued, and that District law does not provide a procedure to compensate plaintiffs for denial of their building permit applications. Their claim that such denial amounts to an unconstitutional taking is thus ripe for review in this forum.

II.

Plaintiffs, relying on the Supreme Court's decision in *Lucas*, 505 U.S. 1003 (1992), claim that denial of their building permit applications constituted "a total taking" for which they are entitled to compensation. Pls.' Mot. for Summ. J. at 1. Defendants counter that a categorical taking has not been effected, as plaintiffs have "not been denied all beneficial use of [the] property." Defs.' Mot. for Summ. J. at 9. Rejecting the applicability of *Lucas*, defendants seek instead to locate this case within the balancing framework established by the Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). They argue that, pursuant to the *Penn Central* analysis, no taking has occurred because while plaintiffs have been denied the opportunity to develop the lawn of the Cathedral Mansions property, they continue to derive "economic value" from it. Defs.' Mot. for Summ. J. at 10.

A.

When reviewing a claim that government action has denied "an owner economically viable use of his land," *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)), a court must determine whether it is to be analyzed through the prism of *Lucas*' categorical standard or *Penn Central*'s balancing inquiry. To do so, the court first has to identify the

relevant parcel of property—the "denominator" to be input into the takings calculus—so that it can assess whether the governmental deprivation has been total or partial. *See, e.g., Lucas*, 505 U.S. 1003, 1016-17 n.7; *see also Keystone*, 480 U.S. at 497.

Plaintiffs contend that the relevant parcel consists of Lots 107-114, namely those comprising the lawn of the Cathedral Mansions complex and those for which they filed the permit applications. Pls.' Opp./Reply at 3-5. If they are correct, denial of the permit applications arguably rendered the relevant property "valueless," such that compensation would be required. *Lucas*, 505 U.S. at 1007, 1029. Defendants, by contrast, argue that the denominator should be defined as "the Cathedral Mansions property as a whole," meaning all of the constituent parts that formed the original Lot 1 that plaintiffs purchased in 1961. Defs.' Mot. for Summ. J. at 10. According to their position, denial of the applications limits the uses to which the lawn can be put, but in so doing does not work an unreasonable diminution in value and thus does not require payment of compensation.

Undisputed facts and governing jurisprudential principles establish that defendants' argument must prevail. To begin with, the Supreme Court in *Penn Central* articulated the general rule that " '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130. More specifically, the Court of Claims, experienced in taking matters, has held that in determining what constitutes the relevant parcel,

> [f]actors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus.

Ciampitti v. United States, 22 Cl. Ct. 310, 318 (1991); *see also K & K Constr., Inc. v. Department of Natural Resources*, 575 N.W.2d 531, 537 (Mich. 1998) (identifying factors of contiguity, unity of ownership, and proposed development scheme).

These factors make clear that the appropriate denominator in this case is the entirety of former Lot 1 purchased by plaintiffs in 1961. First, there is contiguity among all the subdivided lots of the formerly unified property. Second, plaintiffs bought all of Lot 1 at one time, and have owned it in its entirety since the date of acquisition. Third, the District of Columbia tax authorities assessed the land, including the site of the building, as a single parcel, with a separate item on the bill for improvements, from 1922 until 1988. Moreover, the Mayor's Agent found, and the D.C. Court of Appeals has related, that the Cathedral Mansions South building was designed and the site landscaped originally and since maintained (at least until 1988) as an integrated whole, with the building enhanced by the lawn "in order to create the illusion of a resort-like building in a park-like setting." *See District Intown Properties v. D.C. Dep't of Consumer and Regulatory Affairs*, 680 A.2d 1373, 1375 (D.C. 1996). All of these factors demonstrate that the relevant parcel is a singular lot consisting of the apartment building and the lawn.

Supporting this conclusion is the undisputed evidence concerning plaintiffs' "investment-backed expectations." *Penn Central*, 438 U.S. at 124. This factor, generally considered when a court is assessing whether a taking has occurred, *see id.*, also is important at the parcel definition stage because it sheds considerable light on the landowner's conception of how to identify the relevant property. In the instant case, it is undisputed that plaintiffs bought the entirety of Lot 1 in 1961, and maintained it as a single, unified lot until they sought to subdivide it in 1988. It was only during that period—plaintiffs trace it to "approximately" 1986, Pls.' Stmt. of Undisputed Facts ¶ 5, though no evidence indicates

that they made any expenditures before 1988[5]—that plaintiffs developed an expectation of development and began investing money toward that end. *Id.* While not conclusive in terms of parcel definition, plaintiffs' acknowledgment shows that for approximately one quarter-century—dating back to the point of acquisition—they thought of the Cathedral Mansions property as one unified parcel, not nine discreet lots; for at least twenty-five years, then, they had no investment-backed expectations that the singular parcel would be thought of or treated any other way. This, along with the factors discussed above, supports a finding that the appropriate denominator is the entire parcel formerly known as Lot 1.[6]

B.

In view of the foregoing, defendant is entitled to a summary judgment that no categorical taking has occurred here. Plaintiffs' property has not been rendered "valueless" by the District's denial of the permit applications, *Lucas*, 505 U.S. at 1007, and plaintiffs retain "economically viable use of [their] land." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 485 (citation omitted). Indeed, they retain ownership of and a beneficial interest in an apartment building that produces rental income and that possesses market value; they also own

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[5] *See* Pls.' Stmt. of Undisputed Facts ¶¶ 4-12. The exhibits supporting Mr. Calomiris' declaration to this effect evidence no such expenditure before 1988. Pls.' Mot. for Summ. J. Ex. A.

[6] Plaintiffs concede that there is no authority for defining the relevant parcel based solely on how lots are recorded. Indeed, they admit that parcel definition incorporates factors other than just recorded lots, as they argue that "it is entirely appropriate for [the] Court to treat all of the [r]estricted [l]ots . . . as a 'larger parcel' . . . ." Pls.' Opp./Reply at 7. Obviously, if parcels corresponded solely to recorded lots, then plaintiffs' suggestion would be untenable.

the lawn of the complex, which contributes to the property's environment of "a resort-like building in a park-like setting." *District Intown Properties*, 680 A.2d at 1375.

These circumstances establish that the instant case is materially different from *Lucas*. There the beachfront land had no economically beneficial use to the landowner except as a site for a residence; the denial of a building permit required the landowner to leave the land "substantially in its natural state," which left it "without economic value." 505 U.S. at 1018, 1016 n.7. Leaving the land open and undeveloped might have served the public interest in preserving a fragile beachfront from erosion, but there was no suggestion that preservation would serve any economic interest of the landowner with respect to that parcel or any adjacent or related property. Here, by contrast, original Lot 1 is clearly not "substantially in its natural state." Furthermore, while denial of the construction permits promotes the public interest expressed through the Landmark Act, plaintiffs are able to continue to derive significant economic benefits from their property. The foregoing establishes as a matter of law that denial of plaintiffs' construction permit applications did not effect a categorical taking within the meaning of *Lucas*.

C.

This conclusion does not end the inquiry, however. Because denial of plaintiffs' applications arguably effected a partial, yet compensable taking, plaintiffs' claim must now be assessed through the case-specific framework fashioned by the Supreme Court in *Penn Central*. There the Court identified three factors to guide the inquiry: 1) the economic impact of the regulation on the claimant; 2) the regulation's interference with the owner's investment-backed expectations; and 3) the character of the governmental action. 438 U.S. at 124. These factors are addressed in reverse order.

1.

It is well-settled that "[a] taking may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (citations omitted). As opposed, for example, to a regulation that authorizes a "permanent physical occupation of an owner's property," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982), the denial of plaintiffs' permit applications was non-physically intrusive, was part of a more general "public program," *Penn Central*, 438 U.S. at 124, and was aimed specifically at promoting the congressionally recognized public interest in preserving the open space opposite the National Zoo. *See* D.C. Code § 5-410 (1994); *see also* 438 U.S. at 125 (finding that regulation sought to promote the "common good" and "the health safety, morals, or general welfare"). By definition, a regulation of this variety is less likely to effect a compensable taking. *See, e.g., Keystone*, 480 U.S. at 485-93 (finding no taking because of, *inter alia*, the statute's "public purpose").

2.

Similarly, denial of the permit applications does not interfere unnecessarily with plaintiffs' investment-backed expectations. As alluded to above, plaintiffs maintained the property as one unified lot for roughly twenty-five years. Plaintiffs acknowledge that only in 1986—or, as the evidence suggests, 1988—did they begin to develop expectations of developing Lots 107-114 and begin investing money toward that end. Pls.' Stmt. of Undisputed Facts ¶ 5. The late development of plaintiffs' investment-backed expectations serves to distinguish this case from those in which the Supreme Court has found a taking as a result of interference with investment-backed expectations.

For example, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court found a taking when a property owner was prevented from mining coal under particular parcels of property. 260 U.S. at 415-16. Critical to the Court's analysis, as later reported in *Penn Central*, was that the claimant had sold the surface rights to the property, but had "expressly reserved the right to remove the coal thereunder," *Penn Central*, 438 U.S. at 127; the property owner's expectations thus could be traced to the original transaction. Similarly, in *Lucas* the Court underscored that the property owner acquired the two residential lots with the explicit "intention" and expectation of "erect[ing] single-family residences," *Lucas*, 505 U.S. at 1008; the specific investment-backed expectations that were held to have been frustrated therefore underlay the original transaction.

By contrast, it is undisputed that plaintiffs in this case lacked investment-backed expectations at the time they acquired the property in 1961, and that they did not develop them until shortly before they submitted their permit applications. There is no evidence, nor do plaintiffs claim, that their original purchase of Lot 1 was in any way motivated by expectations concerning development of the lawn. Moreover, there has been no suggestion that the nature of the original transaction was shaped by the existence of any such expectations. Denial of the permit applications therefore did not, under the principles established in *Pennsylvania Coal* and *Lucas*, work a compensable interference with plaintiffs' investment-backed expectations.

The gap between the instant case and *Pennsylvania Coal* and *Lucas* is ostensibly bridged by the common feature that regulatory action taken subsequent to the relevant property transaction frustrated each respective property owner's expectations of development. To the contrary, in *Pennsylvania Coal* and *Lucas* the regulatory action was unforeseen, as the respective legislatures enacted regulations that bore on the future use of the newly acquired property. In this case,

plaintiffs were on notice that their property was subject to designation as an historic landmark, and to the restricted uses that accompany such designation. Indeed, when, in the 1980s plaintiffs formed their investment-backed expectations, Congress had enacted, and the District government was administering, laws limiting the use of real property near a federal facility such as the National Zoo, *see* Shipstead-Luce Act, D.C. Code § 5-4101 (1994) (effective May 16, 1930), as well as property designated an historical landmark, *see* Historic Landmark and Historic District Protection Act of 1978, D.C. Code § 5-1002. There may be a dispute as to when plaintiffs knew about neighborhood efforts to designate the Cathedral Mansions property as an historic site, but this dispute is immaterial, as plaintiffs clearly recognized the property's distinguished provenance and knew, or should have known, of the pre-existing legal authority to designate it as an historic landmark—authority that ultimately was exercised. In view of the foregoing undisputed facts, no reasonable trier of fact could conclude that denial of plaintiffs' applications to build townhouses frustrated a reasonable expectation that they would be able to do so under well-established law and regulations.

Plaintiffs nonetheless argue that in 1988, before they sought the disputed permits, they subdivided the property into nine lots, and that the District of Columbia authorities zoned the property according to their subdivision proposal. This argument accords excessive import to the subdivision process. Even if plaintiffs had a legitimate expectation that they could subdivide former Lot 1, it does not follow in the circumstances here that they had a legitimate expectation that they could then build on the subdivided lots. Under District of Columbia law, subdivision and construction are subject to two vastly different regulatory processes; pursuant to the latter, public notice must be issued when building permits are submitted, D.C. Code § 5-1007 (1994), while under the former no such notice is required. This stark dichotomy

highlights that construction is a matter of heightened public concern. When coupled with the unique location of the Cathedral Mansions complex, and the fact that the *tout ensemble* is a treasured period piece of a famous architect, as a matter of law plaintiffs were not entitled to have a reasonable expectation that their permit applications would be granted. Furthermore, plaintiffs' "bootstrapping" of their own property from one to several lots without interrupting ownership places them in a less favorable posture than that enjoyed by an innocent purchaser of the newly subdivided lots. *See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993).

3.

The final factor to be considered in the *Penn Central* analysis—the economic impact of the regulation—also supports a finding that no taking has occurred. It is well-settled that when governmental action "does not interfere in any way with the present uses" of the property, and when that action allows the owner "not only to profit from the [property] but also to obtain a reasonable return on its investment," there is an insufficient economic effect to warrant compensation. *Penn Central*, 438 U.S. at 136 (citations omitted). Here, denial of the permit applications "does not interfere with what must be regarded as [plaintiffs'] primary expectation concerning the use of the parcel"—as an apartment complex. *Penn Central*, 438 U.S. at 136. Plaintiffs continue to own and operate the apartment building, and they retain the landscaped lawn that, like the space above Grand Central Terminal, "provid[es] air, light, and views" to the apartments. Pls.' Mot. for Summ. J. Ex. B-1 at 2. Plaintiffs have not argued that the present arrangement does not yield a reasonable return, and they have not alleged disputed facts that such return has been diminished as a result of the denial of their permit applications.

Furthermore, plaintiffs do not dispute that the lawn effects architect Harry Wardman's plan of synergistic value created by the building and the lawn, a plan that the Historic Preservation Board concluded, with reason and without contradiction by plaintiffs, was achieved through a complex "sited imaginatively to provide the greatest possible integration of living space with well-landscaped open space." Pls.' Mot. for Summ. J. Ex. B-5 at 1. More specifically, plaintiffs have not alleged disputed facts to suggest that the lawn, in its present state, contributes no value to the relevant parcel of property. The only allegation they have made is that the lawn has no economic value *when divorced from the rest of the property*. Depos. of Harry A. Horstman, Pls.' Opp./ Reply Ex. 1-C at 136. But since it has been established that the proper denominator in the takings calculus is the entirety of former Lot 1, not current Lots 107-114, *see supra* Part II.A., a valuation of a hypothetically detached lawn is irrelevant. Plaintiffs have failed to proffer relevant evidence that the open space makes no significant contribution to the economic value of the complex as a whole. In these circumstances, and particularly in light of the Board's undisputed findings and conclusions, defendants had no responsibility to offer expert testimony to the contrary. Thus, while denial of the permits may prevent plaintiffs from maximizing the value of their property, it does not as a matter of law work such a significant diminution of value as to effect a compensable taking. *See Penn Central*, 438 U.S. at 137.

The three *Penn Central* factors considered, undisputed facts establish as a matter of law that defendants have not effected a compensable taking. Accordingly, an accompanying Order grants defendants' motion for summary judgment and denies that filed by plaintiffs.

DATE: September 25, 1998 /s/ LOUIS F. OBERDORFER
United States District Judge

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

March 2, 2000

Mr. E. Barrett Prettyman
Hogan & Hartson
555 Thirteenth Street, N.W.
Washington, DC 20004

Re: District Intown Properties Limited
Partnership, et al.
v. District of Columbia, et al.
Application No. 99A704

Dear Mr. Prettyman:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on March 2, 2000, extended the time to and including April 17, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER
Clerk

By /s/ CLAYTON R. HIGGINS, JR.
Clayton R. Higgins, Jr.
Assistant Clerk

Supreme Court, U.S.
FILED
JUL 31 2000
CLERK

No. 99-1663

IN THE

Supreme Court of the United States

DISTRICT INTOWN PROPERTIES L.P., *ET AL.*,
Petitioners,

v.

DISTRICT OF COLUMBIA, *ET AL.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

No. 99-1663

DISTRICT INTOWN PROPERTIES L.P., *ET AL.*,

Petitioners,

v.

DISTRICT OF COLUMBIA, *ET AL.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

STATEMENT

Petitioners ask for review of trial and appellate court holdings that they need not be compensated under the Takings Clause of the Fifth Amendment when government regulation allows them to make profitable use of their property by using the property "'precisely as it has been used' for the past 28 years." A. 14a-15a, quoting *Penn Central Transportation Company v. New York*, 438 U.S. 104, 136 (1978).

In comprehensive discussions, all three court of appeals judges agreed that, under this Court's precedent, inability to make more intensive use of the property did not result in a taking. The district court came to the same conclusion on the basis of the same case-law. No relevant split exists among the circuits or among the highest courts of the states. The writ should be denied.

1. The property is an eight-acre tract known as Cathedral Mansions South, across Connecticut Avenue from the National Zoo. It consists of a large apartment house and grounds that front on the Avenue. The property was designed as a coherent whole in 1929 by a noted local developer to create the appearance of a suburban resort. No change in the property's use has occurred since 1929.

The property has been described by the District of Columbia's Historic Preservation Review Board as "sited imaginatively to provide the greatest possible integration of living space with weli-landscaped open space." D.C. Cir. J.A. 286. An administrative law judge, in findings that were never challenged, found:

> The resort-like apartment building was an attempt to bring the kind of amenities people had access to in the suburbs to the city dweller. One of its greatest amenities was, and is, the exposures that are supplied to the tenants, providing air, light, and views.
>
> The lawns are an integral and essential part of the design and concept of [Cathedral Mansions South] * * *.

Id. at 284 (paragraph numbers and citations omitted).

At the time it was acquired in 1961, the apartment complex was subject to the Shipstead-Luce Act, 46 Stat. 366, ch. 291, 40 U.S.C. § 121, D.C. Code § 5-410, enacted to allow "a reasonable degree of control" over private buildings abutting or fronting on various federal properties, including the Zoo. The act authorizes the federal Commission of Fine Arts to review building permit applications and to recommend steps to prevent "reasonably avoidable impairment" of "public values" associated with the federal property. The Mayor of the District of Columbia is directed to "effect reasonable compliance" with the Commission's recommendations.

Since 1979, property in the District of Columbia is governed by a Historic Landmark and Historic District Protection Act, D.C. Code § 5-1001 *et seq*. Landmarks are designated by a Historic Preservation Review Board after a public hearing. Once designated, the landmark cannot be demolished, altered, or subdivided unless the project is one of "special merit" or the owner can establish that denial of the necessary permit would result in "unreasonable economic hardship." D.C. Code §§ 5-1004 to 5-1006. A project of special merit is defined as "a plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services." D.C. Code § 5-1002(11). No new construction is permitted on the site of a landmark if "the design of the building and the character of the historic district or historic landmark are incompatible." D.C. Code § 5-1007(f). A proposal to add an additional building on a lot already occupied by a building may be denied entirely if the "additional construction will be incompatible with the character of the historic district or historic landmark." *Id.*[1] Most proceedings under the Landmark Act occur in trial-type hearings in accordance with the local Administrative Procedure Act. *See* D.C. Code § 5-1012.

In 1987, two citizens groups began a "widely-publicized process" to have broad areas near Cathedral Mansions South given historic district or landmark designation. D.C. Cir. J.A. 285. (Their efforts ultimately resulted in an almost continuous band of historic districts and landmarks along Con-

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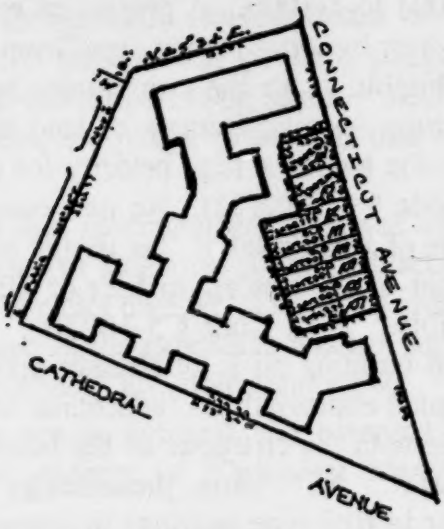
[1] "Compatibility * * * is thus the sole statutory criterion for determining whether new construction shall be authorized." *District Intown Properties L.P. v. Department of Consumer & Regulatory Affairs*, 680 A.2d 1373, 1378 (D.C. 1996).

necticut Avenue for a mile or more both below and above the zoo and petitioners' property. A. 16a).

Perhaps in response to the groups' campaign, petitioners filed plat changes subdividing the property with the Office of the Surveyor in April 1988. Instead of the single lot that had been in existence since at least 1929, the subdivision created one lot for the apartment house and eight lots on the grounds facing Connecticut Avenue:[2]



In an affidavit, one of the petitioners acknowledged that Cathedral Mansions South "constituted one undivided parcel of property" before 1988. D.C. Cir. J.A. 53.

Under District law, land owners may make plat changes without notice to the public or permission from the Surveyor. D.C. Code § 1-920. So long as the size of the redrawn lots meets minima specified by the zoning regulations, the plat

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[2] *Source*: detail of attachment to Application for Historic Landmark, Mar. 1, 1989, reprinted in D.C. Cir. Br. for National Trust for Historic Preservation, *et al.*, as *amici curiae*. The existing building is on the left; the newly-created lots border directly on Connecticut Avenue.

changes will be recorded as a ministerial matter. D.C. Code § 1-921. Other than minimum lot size, there is no necessary correspondence between plat and zoning lots. 11 D.C.M.R. § 199.1 at 1-19 (zoning definition of "lot"). The only immediate consequence of subdivision is that reconfigured lots are taxed in accordance with their new configuration. D.C. Code § 47-802(1). The tax consequences of subdivision are within the property owners' control because lots may be as easily integrated as divided. A. 12a.

The record shows that petitioners spent $2,819 to survey and record the subdivision. Aside from that, the record contains no evidence of other spending, if any, on potential development of the property. The Surveyor recorded the subdivisions at the end of June 1988.

Six months after the subdivision, petitioners applied for building permits for three-story townhouses on each of the eight new lots. The townhouses would have occupied more than half of Cathedral Mansion South's remaining grounds. Building permits require approval of several government agencies. In February 1989, zoning officials approved petitioners' plans for filing, but no permits had been issued as of March.

In early March, neighbors filed their landmark-designation application. Under the Landmark Law, an application automatically confers temporary landmark status until Historic Preservation Review Board review is completed. D.C. Code § 5-1002(6)(B). The Review Board approved the landmark designation in May 1989. The landmark is the entire parcel. Petitioners did not ask for judicial review of the designation.

The applications to build the eight townhouses were submitted to the Board sometime in the spring of 1989. As part of the review process, the Commission of Fine Arts unanimously resolved in March that the townhouse project was "completely inappropriate" for the site. D.C. Cir. J.A. 317. In July, the Board recommended that the building permits be

denied on the basis of the Commission's written comments, expert and lay testimony, and a staff analysis showing that the grounds were integral to the landmark.

Petitioners appealed the Review Board's recommendation to deny the permits, but abandoned the appeal in December 1991.

A month after abandoning the 1988 applications, petitioners filed eight new applications identical to the ones they had abandoned. The record shows no additional investment by petitioners in the project. In March 1992, the Board voted to recommend denial of the new applications. Petitioners asked for further review.

An administrative law judge, acting by delegation from the Mayor, denied the second group of applications in 1993 because the proposed townhouses were incompatible with the character of the landmark. Although the ALJ thought that no construction would be compatible, his jurisdiction was limited to assessing the specific application before him. D.C. Code § 5-1007(a)("* * * the Mayor shall review the permit application in accordance with this section * * *). The ALJ also held that the petitioners had not demonstrated economic hardship.[3]

Petitioners appealed to the District of Columbia Court of Appeals, but because they had not challenged denial of the permits, the court dismissed the appeal as moot. *District Intown Properties L.P. v. Department of Consumer and Regulatory Affairs*, 680 A.2d 1373, 1379 (D.C. 1996). The court

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[3] The Cathedral Mansions South apartments are subject to rent control. Under the District of Columbia's rent-control law, rental property is entitled to a 12% rate of return, calculated by dividing net income by the owner's equity. D.C. Code § 45-2522. The rate of return is calculated by a formula in which petitioners' equity in Cathedral Mansions South as a whole constitutes the denominator and their property tax payments for the grounds would be included in deductions from gross income to derive net income (the numerator). *See* D.C. Code § 45-2522(b)(1)(C).

held, however, that the ALJ's statements concerning economic hardship could have no preclusive effect because the matter was outside his jurisdiction. *Id.* at 1378-1379.

2. Petitioners brought this action in 1996, demanding compensation for a regulatory "taking." On cross-motions for summary judgment, the district court held that petitioners had not been denied all economic use of their property, viewed as a whole. A. 29a-45a. The court concluded that petitioners' circumstances were therefore materially different from those in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). A. 36a-40a. The court also held that petitioners continued to obtain a reasonable economic return on their property, as in *Penn Central*, and that they had shown no reasonable investment-backed expectations that had been thwarted. A. 41a-45a.

The court of appeals affirmed. A. 1a-28a. The majority agreed that the property should be treated as a single parcel for takings analysis. A. 8a-9a. Not only was there common ownership, but all of the parcel was spatially and functionally contiguous and petitioners had treated the parcel as indivisible for over 25 years, even after subdivision. A. 9a. The court agreed with the trial court that petitioners had not established that they had been denied economic use of the parcel as a whole; they had not even presented evidence that the economic value of each of the new lots recorded in 1988 had been utterly destroyed. A. 13a. The court also held that denial of the applications defeated none of petitioners' reasonable investment-backed expectations. A. 15a. By the time of subdivision, the Landmark Act had been enacted and petitioners knew (or should have known) that their property would be subject to the new regulatory scheme. A. 16a.

The concurring judge agreed that the court's opinion generally followed this Court's precedent. A. 17a, 28a. The concurrence believed, however, that this Court's "prevailing analysis" was inconsistent with "economic reality" and pre-

vents full use of the Takings Clause in line with the "framers' likely purposes." A. 17a. The concurrence also rejected the court's "gratuitous[]" supplemental holding that petitioners had failed to provide sufficient evidence of a taking were the new lots to be analyzed independently. A. 27a-28a.[4]

REASONS FOR DENYING THE WRIT

Petitioners' use of their property, from which they undeniably profit, remains undisturbed by rejection of their plan to use the property more intensively. No taking occurs when owners have only "been denied the ability to exploit a property interest they heretofore had believed was available for development." *Penn Central*, 438 U.S. at 130. Not only do petitioners continue to receive a reasonable rate of return from their property, regulation has defeated no reasonable investment-backed expectations, and petitioners benefit from historic preservation designations of neighboring properties.

1. The decisions of the courts below are entirely consistent with this Court's precedent holding that the economic

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[4] Neither the court nor concurring opinions explicitly examined ripeness, an examination "compelled by the very nature of the inquiry." *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190 (1985); *see McDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986)("[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes").

The District's brief in the court of appeals noted that petitioners had presented a single development scheme for the landmark. Denial of that one plan would ordinarily be insufficient to establish that the grounds lots, even if properly considered in isolation, had no economically viable use. *McDonald*, 477 U.S. at 353 n. 9; *Penn Central*, 438 U.S. at 136-137. Nevertheless, given the reviewing agencies' approaches, the District acknowledged that it seemed more likely than not that construction on at least one recorded lot would be deemed incompatible with the landmark, no matter what plan is proposed.

impact of regulation must be examined using the parcel as a whole.

In its most recent consideration of the question, the Court reaffirmed the parcel-as-a-whole standard. *Dolan v. Tigard*, 512 U.S. 374 (1994). The central issue in *Dolan* was whether a requirement that the property owner dedicate a portion of her property for use as a public greenway as a condition for receiving a building permit resulted in a taking. In its discussion, the Court observed that the permit conditions, viewed simply as a limitation on use of the property, would not rise to the level of regulatory taking: because a "land use regulation does not effect a taking if it * * * does not 'den[y] an owner economically viable use of his land,'" there could be "no argument that the permit conditions would deprive petitioner of 'economically beneficial us[e]' of her property as she currently operates a retail store on the lot." *Id.*, at 385 & n. 6; brackets, the Court's. In short, the Court accepted the relevant parcel for analyzing a regulatory takings claim to include the entire property, not just the portion required for the greenway. Just as Dolan's ability to operate the store on the balance of her property precluded a finding of a regulatory taking, so could the lower courts here reasonably conclude that petitioners' continued profitable operation of the apartment house was not a taking despite restrictions on development of the grounds, considering the parcel as a whole.

Previously, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), the Court rejected an argument that a statute preventing coal companies from mining 27 million tons of coal to avert subsidence of the ground surface was a taking. The 27 million tons could no more be treated as a separate segment of property than the grounds of a structure on which a zoning law prohibits construction. *Id.* at 498, citing *Gorieb v. Fox*, 274 U.S. 603, 608 (1927). The Court also rejected the claim that, because Pennsylvania recognizes a support estate as a separate interest in land, the requirement

that supports be retained entirely destroyed their "support estate." Takings analysis, the Court held, forecloses reliance on such "legalistic distinctions within a bundle of property rights." *Id.* at 500.

In *Penn Central* the Court used the parcel-as-a-whole analysis to reject the owners' contention that a historic preservation statute, preventing the erection of a more than fifty-story office tower over Grand Central Station, had taken all of their airspace. The Court wrote that the focus should be "on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.'" 438 U.S. at 130-131. If a taking could be established by showing that property could no longer be exploited to its fullest,

> this court would have erred not only in upholding laws restricting the development of air rights, see *Welch v. Swasey* [214 U.S. 91 (1909)], but also in approving those prohibiting both the subjacent, see *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and the lateral, see *Gorieb v. Fox*, 274 U.S. 603 (1927), development of particular parcels. "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.

Id. at 130; footnote omitted.

The Court has extended the "parcel-as-a-whole" doctrine to government regulations preventing full economic exploitation of personal property. In *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-644 (1993), the Court unanimously rejected a claim that a federal law imposing a liability on employers withdrawing from a pension system (which had the effect of eliminating 46% of Concrete Pipe's shareholder equity) took the employer's property in its entirety. A parcel of property

"could not first be divided into what was taken and what was left"; "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Id.* at 644. In *Andrus v. Allard*, 444 U.S. 51, 64-68 (1979), the Court rejected the argument that a ban on the sale of all bird-feather artifacts, including objects acquired before the ban, qualified as a compensable taking. Although the prohibition extinguished the opportunity to sell the feathered objects, owners retained rights to possess, transport, donate, exhibit, or devise them: when "an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 66.

The decisions below are entirely consistent with the Court's precedent and modes of analysis. The concurring opinion arrived at the same conclusion, if grudgingly. *See* A. 28a ("* * * the Supreme Court's general approach seems to militate in favor of looking to the parcel as a whole"; the Court's precedent gives counter arguments "little purchase").

2. There is no pressing need to revisit the parcel-as-a-whole doctrine at this time (or in this case).

As a preliminary matter, this Court has been understandably wary about creating bright-line tests for the Takings Clause. Takings jurisprudence, the Court has long held, involves "question[s] of degree—and therefore cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Compensability "depends upon the particular facts" of the case. *Id.* at 413, quoted with approval in *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999). Inquiries therefore have often been described as "essentially ad hoc [and] factual." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *see Lucas*, 505 U.S. at 1015; *McDonald, Sommer & Frates v. Yolo*

County, 477 U.S. 340, 348-349 (1986); *Keystone*, 480 U.S. at 508; *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981); *Penn Central*, 438 U.S. at 124; *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *see also Goldblatt*, 369 U.S. at 594 (takings analysis does not lend itself to a "set formula to determine where regulation ends and taking begins"); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 541 (1998)("Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law")(Kennedy, J., concurring in judgment, dissenting in part).[5]

In any event, courts have had no significant disagreements about the meaning of the Court's existing case-law (notwithstanding the overwrought rhetoric of commentators cited in the petition). There are no major disagreements among either the federal courts of appeals or the highest courts of the states. Using multi-factored analyses to account for factual differences, they have refused to give substance to owners' purely formal organization of property when applying the parcel-as-a-whole standard. *See, e.g.*, *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365-1367 (Fed. Cir. 1999), *cert. denied sub nom. RCK Properties, Inc. v. United States*, 68 U.S.L.W. 3262 (1999); *Broadwater Farms Joint Venture v. United States*, 35 Fed. Cl. 232, 239-240 (1996), *aff'd in relevant part*, 121 F.3d 727 (table), 1997 U.S. App. LEXIS 19859 (text) at *3-*6 (Fed. Cir. 1997); *Deltona Corp. v.*

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[5] One commentator has noted:

> Although one could conceivably propose such a [bright-line] standard, it is unlikely that it would prove to be satisfactory in the vast majority of cases. Rather, it would end up being regarded as a Procrustean bed, with courts hopelessly trying to fit their factually unusual cases within the rule's narrow formulation.

M.C. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 719 (1996).

United States, 228 Ct. Cl. 476, 657 F.2d 1184, 1192 (1981), *cert. denied*, 455 U.S. 1017 (1982); *Jentgen v. United States*, 228 Ct. Cl. 527, 657 F.2d 1210, 1213 (1981), *cert. denied*, 455 U.S. 1017 (1982); *Annapolis v. Waterman*, 357 Md. 484, 745 A.2d 1000, 1022 (2000); *K & K Construction, Inc. v. Department of Natural Resources*, 575 N.W.2d 531, 535-538 (Mich. 1998), *cert. denied*, 525 U.S. 819 (1998); *Zealy v. Waukesha*, 201 Wisc.2d 365, 548 N.W.2d 528, 532-34 (1996); *Bevan v. Brandon Township*, 438 Mich. 385, 475 N.W.2d 37, 43 (Mich. 1991), *cert. denied*, 502 U.S. 1060 (1992).

The only clear exceptions to this uniformity are isolated state intermediate appellate court decisions (the most recent of which arose in litigation that remains active and is therefore subject to further state appellate review). Pet. at 15-17, citing *Machipongo Land & Coal Co. v. Pennsylvania*, 719 A.2d 19 (Pa. Commw. Ct. 1998); *Twain Harte Associates, Ltd. v. County of Tuolumne*, 217 Cal. App. 3d 71, 265 Cal. Rptr. 737 (1990), *review denied* (Cal. Apr. 4, 1990). The petition also cites *Boise Cascade Corp. v. Board of Forestry*, 935 P.2d 411, 419-420 (Or. 1997). There, the court held that a complaint alleging deprivation of "the only economically viable use" of a logging company's timber because of logging restrictions on 56 of 64 acres, stated a cause of action under the *state* constitution. *Id.* at 419 n. 13 ("This court considers state constitutional claims before considering federal constitutional claims"). The court cited none of this Court's decisions and based its analysis entirely on state precedent. Neither the intermediate appellate court decisions nor the Oregon court's interpretation of its state constitution create a need for augmenting this Court's existing precedent.[6]

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[6] The petition also cites *Corrigan v. Scottsdale*, 149 Ariz. 553, 720 P.2d 528 (Ariz. App. 1985), *aff'd in part, vacated in part*, 149

(continued...)

Finally, although the merits of the Court's precedents are not at issue at this stage, it deserves noting that petitioners' proposed rejection of the parcel-as-a-whole standard endangers a broad variety of traditional urban land planning regulations limiting intensity of use, such as minimum lot sizes, limitations on lot occupancy, side- and rear-yard open space requirements, and historic preservation. *See Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980)(recognizing open space requirements as legitimate government regulation); *Penn Central*, 438 U.S. at 107 (noting that all fifty states and over 500 municipalities had enacted historic preservation laws as of 1978). As one leading authority testified a few years ago, such regulation is

> almost universally accepted as fair to both the public and to property owners * * * Indeed, with adaptive and innovative modern techniques stimulated by local land use regulation * * * owners often end up with developments that are highly profitable and attractive to buyers, even though not every acre can be developed.
>
> The risk here is owners "gaming the system" by rearranging ownership patterns to maximize compensability * * *.

Statement by J. L. Sax, Hearings on Private Property Rights and Environmental Laws, Sen. Comm. on Environment and Public Works, 104th Cong., 1st sess., Jun. 27, 1995, at 78.

In addition, there is little support for the concurring opinion's statement (A. 17a), that this Court's precedent defeats the founders' "likely purposes." *See Lucas*, 505 U.S. at 1014

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[6] (...continued)
Ariz. 538, 720 P.2d 513 (1986), *cert. denied*, 479 U.S. 986 (1986). Although the landowner there owned three parcels, the city apparently never argued that they should all be considered as one. Neither court directly addressed the first question raised by the petition.

(prior to *Pennsylvania Coal Co.* in 1922, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession"; citations omitted; brackets, the *Lucas* Court's). *See also*, J.F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARVARD L. REV. 1252 (1996).[7]

3. There is no pressing reason for reviewing the application of this Court's precedent to the facts of this case.

Unlike *Lucas*, this is plainly not an case in which petitioners have been denied economically viable use of their property. Inability to implement petitioners' single plan for the landmark left them with property generating a reasonable return on their current equity. Petitioners presented no evidence to the contrary. Absent such evidence, it is fair to assume that the rate of return on equity is at least 12%. *See* above at 6, n. 3.

The property is being used as it was deliberately designed, as an apartment building in a "resort-like" setting, a use to

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[7] Hart writes:

> Application of the Takings Clause to regulations of land use must confront and explain the silence in the constitutional text. The Takings Clause refers only to *taking* property; as to regulating property, it is silent. [At 1290; italics in original, footnote omitted].
>
> * * *
>
> The evidence concerning the Framers' experience with land use regulation suggests that the Takings Clause means what it says about land use regulation: nothing. The reason the Framers did not address land use regulation in the Takings Clause is that they did not regard it as a taking. [At 1292].
>
> * * *
>
> The tradition that courts have relied on for over a century—the view that American governments traditionally regulated land use minimally, and that regulation ventured little beyond nuisance law in scope—is false. [At 1299].

which petitioners themselves put the property for 27 years. There is unity of ownership and physical contiguity. As one of the petitioners acknowledged, for at least sixty years, Cathedral Mansions South "constituted one undivided parcel." *See* above, at 4. Except for formal plat changes in 1988 (themselves easily reversible), that is still the case.

As a unit, the property enjoys the average reciprocity of advantage common to all similarly regulated properties in the community. *See Pennsylvania Coal*, 260 U.S. at 422. Unlike the isolated landmark at stake in *Penn Central*, Cathedral Mansions is situated amid a broad swath of historic districts and historic landmarks. *See* District of Columbia Inventory of Historic Sites (map, 1998), appended to D.C. Cir. br. for National Trust for Historic Preservation. Undesignated areas in the vicinity are the rare exception. Petitioners "therefore will share with other owners the benefits and burdens of the city's exercise of its police power." *Agins*, 447 U.S. at 262.

Treating the property as a single parcel defeats no reasonable investment-backed expectations. The Court considers only owners' "primary expectations." *Penn Central*, 438 U.S. at 136. Those expectations normally arise at the time of acquisition. *See Lucas*, 505 U.S. at 1008; *Penn Central*, 438 U.S. at 127. Petitioners presented no evidence that they expected to alter the property's traditional use when they purchased it in 1961 (or in the 27 years after purchase). Moreover, their development choices were circumscribed at the outset by the Shipstead-Luce Act which governed building near the zoo. *See Stanley Co. v. Tobriner*, 111 U.S. App. D.C. 404, 298 F.2d 318, 319 (1961)(affirming refusal to issue permit to alter building visible from Pennsylvania Avenue). That law formed a "background principle[]" of District of Columbia property law at the time petitioners purchased Cathedral Mansions South. *See Lucas*, 505 U.S. at 1031.

To the extent that petitioners subsequently decided to carve up their property in 1988, their new expectations, if

relevant, were not investment-backed. There is no record evidence of any expenditures associated with the 1991 applications. (As for the voluntarily abandoned 1988 applications, petitioners' $2819 expenditure is a *de minimis* investment in light of the property's assessed value of $2.3 million at the time). Besides, by 1991, petitioners expectations of substantial changes in intensity of use were no longer reasonable in view of enactment of the Landmark Law *before* the subdivision and the landmark designation *before* the 1991 applications. The function of the reasonable investment-backed expectations element of Takings Clause jurisprudence is to protect landowners from the risks of unforeseen changes in applicable law. It follows that owners should bear risks that *are* foreseeable. *See id.* at 1035 ("The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment")(Kennedy, J., concurring).

4. There is no need to review the court of appeals secondary holding, that petitioners had not presented competent evidence that the new lots—even if considered in isolation—had lost all economic value as a result of denial of their only development plan. A. 13a.

The evidentiary issue, raised by the petition's second question, was not essential to the court's judgment in view of the holding that the new lots could *not* be considered in isolation. A. 12a (under this Court's precedent, "we must analyze District Intown's property not as separate, potentially divisible and transferable parcels, but as one contiguous parcel").

The court of appeals is correct, however, that there was a failure of proof. Rejection of one "grandiose development plan does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *McDonald, Sommer & Frates*, 477 U.S. at 353 n. 9. A less massive plan, one which does not altogether obliterate views of (and from) the apartment house, might be found compatible with the land-

mark by the Commission on Fine Arts, the Historic Preservation Review Board, or (most importantly) an administrative law judge. Tennis courts, a swimming pool, an ice skating rink, for example, might be considered compatible with a "resort-like" setting. An underground parking lot might be feasible and unobtrusive. Even some above-ground construction might be approved. Absent petitioners' exploration of a single option other than their original proposal, the court of appeals could reasonably conclude that petitioners had not established that the new lots were entirely valueless by themselves.[8]

Not only is the adequacy of evidence not deserving of this Court's consideration, it is irrelevant; under the Court's precedent, the lots have no significance independent of the parcel as a whole.

Neither question presented by the petition is worthy of further review.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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[8] The petition's reference (at 25) to petitioners' appraiser's deposition is misleading. His testimony, that the new lots would have no value when separated from the rest of the property, was predicated on an unsupported assumption: "*if* you have to maintain it as a lawn." D.C. Cir. J.A. 447; italics added. The appraiser also misunderstood local law when he claimed that the parcel, as a whole, derived no economic benefit from its grounds because of rent control. *Id.* at 452. In fact, petitioners' equity and property tax payments determine whether the property is yielding at least a 12% rate of return. *See* above, at 6, n. 3. Moreover, his conclusion was contradicted by another appraiser who stated that the highest and best use of the grounds was their existing use as integral parts of the apartment complex. *Id.* at 451.

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No. 99-1663

In the Supreme Court of the United States

DISTRICT INTOWN PROPERTIES LIMITED PARTNERSHIP, ET AL., PETITIONERS,

v.

DISTRICT OF COLUMBIA, ET AL., RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND AMERICAN FARM BUREAU FEDERATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. When analyzing a governmental regulation of property for Takings Clause purposes, how should courts determine the relevant unit of property in a case where a landowner owns several geographically contiguous parcels, only some of which are burdened by the regulation?

2. Does a governmental regulation of property that requires a landowner to leave eight contiguous lots in a completely undeveloped state as a grass lawn deny "all economically beneficial or productive use of land" within the meaning of *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992)?

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INTEREST OF THE AMICI CURIAE [1]

The National Association of Home Builders (NAHB) represents over 190,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, condominiums, and apartments, but also commercial and industrial builders, remodelers, and land developers. It is the voice of the American shelter industry.

The NAHB, whose members are highly dependent on land use decisions made by government bodies, has appeared before this Court as amicus curiae or a party in many prior regulatory takings cases. Cases in which the NAHB has participated include *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304 (1987); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *City of Monterey* v. *Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999).

The American Farm Bureau Federation ("AFBF") was established in 1920 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 4.9 million member families. AFBF's farmer and rancher members own or lease significant amounts of land, on which they depend for their livelihoods and upon which all Americans rely for food and other

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[1] This brief was not written in whole or in part by counsel for a party and no one other than NAHB and AFBF made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been filed with the Clerk.

basic necessities. Because that land is subject to increasingly onerous government regulation, AFBF and its members are vitally interested in the legal rules establishing the availability of compensation under the Takings Clause when regulation goes too far. Accordingly, AFBF has participated as an amicus in this Court in support of property rights in *Lucas*, *Dolan*, *Suitum*, and *Del Monte Dunes*, among other cases.

This case presents an issue of great importance to NAHB's and AFBF's members. How the relevant parcel is defined for purposes of takings analysis will often determine whether or not an NAHB or AFBF member whose investment-backed expectations in property have been interfered with by government regulation may obtain just compensation. Absent a clear rule on this issue, NAHB and AFBF members in different jurisdictions face inconsistent treatment under what is supposed to be a uniform national Takings Clause. And absent an approach that requires compensation in the circumstances of this case, home builders and farmers throughout the Nation run a substantial risk that government will use the indirect tool of regulation to obtain land for public amenities, rather than follow the constitutionality prescribed method of paying for those amenities. The Takings Clause is intended precisely to prevent what occurred in this case and what home builders and farmers endure over and over again: a government body forcing one landowner to bear all the cost of providing a public good, when "in all fairness and justice," that cost "should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

The NAHB and AFBF believe that they can illuminate the need for immediate review of the issues presented in the petition and the harmful consequences of leaving the so-called "denominator problem" unaddressed. If requiring eight out of a developer's nine lots to lie economically fallow in perpetuity as a "historic landmark" is not a taking, then virtually no home builder or farmer is safe from huge, uncompensated regulatory burdens in the name of the public good. That is not what the Framers of the Bill of Rights contemplated.

STATEMENT OF THE CASE

The critical facts in this case are few but telling. The District of Columbia granted petitioner District Intown Properties Limited Partnership permission to subdivide its eight-acre Cathedral Mansions property into nine contiguous lots.[2/] One of those lots contains a 1920s rental building. The other eight are grass lawn. After subdivision, the District taxed the eight lawn lots "at a higher rate, * * * reflecting [its] assessment that these lots are vacant developable land." Pet. App. 12a. The District's Department of Consumer and Regulatory Affairs (DCRA) subsequently granted zoning approval for petitioner to build one single-family townhouse on each of the eight lots maintained as lawn. Petitioner still had to obtain building permits for its townhouse project, however, and that is where things went awry. Pet. App. 1a, 3a, 29a-30a.

Residents in the Woodley Park neighborhood petitioned to have the Cathedral Mansions building and contiguous lots designated as a historic landmark. Petitioner did not object to the designation of the building, but vigorously protested the designation of the eight lawn lots. Despite the oddity of the notion that eight acres of lawn in a residential neighborhood—lawn with no historical associations except its proximity to a 1920s apartment building—could properly be termed a *historic landmark* (as opposed to, say, a desirable site for open space, see Pet. App. 26a), the District's Historic Preservation Review Board granted the neighbors' petition. Based on the historic landmark designation, the District denied petitioner a building permit and stated that "*any* construction destroying the lawn" would be incompatible with the historic landmark designation, effectively requiring that the lawn be maintained as such in perpetuity. Pet. App. 3a-4a, 29a-30a. As Judge Williams observed, "upper

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[2/] Petitioners include two general partners, but for the sake of simplicity we refer throughout only to the petitioner partnership.

Northwest Washington[ians thereby] secured some parkland on the cheap." Pet. App. 26a-27a.

Understandably, petitioner believed that since eight of its nine lots had been involuntarily converted into green space of no conceivable economic value, it had suffered a *Lucas* total wipe-out as to those eight lots and was entitled to just compensation. That claim—rejected by the district court and District of Columbia Circuit for reasons cogently summarized in the Petition—squarely raises a pure question of law that has perplexed lower courts, leaving one of the most important issues in takings law in total disarray: what is the relevant parcel (the "denominator") for purposes of determining if government regulation has worked a taking for which compensation is due? That question is in urgent need of this Court's attention.

As Judge Williams' thorough and incisive concurrence points out, the view of Chief Judge Edwards and Judge Rogers that the relevant parcel in this case was all nine lots taken together makes no sense as a matter of constitutional interpretation or of economics and has the effect of "obliterating takings law." Pet. App. 27a. It "elevates formal concepts over economic reality" and "strip[s] the Takings Clause of its potential" to fulfil the Framers purposes. Pet. App. 17a.

SUMMARY OF ARGUMENT

The "denominator problem" has percolated long enough in the state courts and lower federal courts and has wreaked enough havoc. It is time for this Court to bring coherence to a currently splintered doctrine that invites government to "game" the Takings Clause to achieve public goals at no cost—precisely the result the Framers of the Bill of Rights sought to avoid. This case presents clean facts and no extraneous issues and is the perfect vehicle for this Court to begin to address a question of critical practical importance to the *amici* and their members, and every other American landowner concerned about excessive, uncompensated land-use regulation.

Amici agree with petitioner that the correct analysis of the parcel for purposes of applying the Takings Clause is to look solely to the portion of the property that has been subjected to regulation. This Court should hear this case to establish that clear, easily applied, and constitutionally correct principle.

Even if those courts like the Federal Circuit that have applied a multi-factor test to determine the appropriate parcel are correct, the court of appeals here certainly erred in its understanding of the multi-factor test and in its choice and weighting of factors. If a multi-factor test is to be used to determine the denominator of the takings equation, this Court's guidance is urgently required to identify the relevant factors and their interrelationship.

Finally, the court of appeals' alternative holding that the eight lots condemned to remain lawn had economic use that precluded a successful takings claim itself warrants this Court's review. Lower courts need to be instructed that defendants' or courts' abilities to imagine hypothetical, speculative, or insignificant "economic" uses for land may not stand in the way of just compensation. "[T]he very barest thread of value, yielded by some thoroughly bucolic use," is not enough to defeat a total takings claim. Pet. App. 28a.

REASONS FOR GRANTING THE PETITION

I. THE DENOMINATOR PROBLEM REQUIRES THIS COURT'S IMMEDIATE ATTENTION.

The petition amply demonstrates that federal and state courts are in hopeless disarray over how to deal with the "denominator problem" identified but not resolved in *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987), and *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). The voluminous academic literature, a small part of which is surveyed in the Petition, is in as much disarray as the judicial decisions and provides no clear direction. The time is now ripe for the Court to provide some guidance, because the conflicts are deep-seated and involve complex issues that lower courts and

commentators have been unable to resolve with any consistency. The denominator problem will remain unresolved, and the conflicts will only deepen, unless this Court intervenes.

In recent years, the Court has greatly clarified the law of takings by addressing and resolving many outstanding questions about the meaning of the Fifth Amendment and the litigation of takings claims. See, *e.g.*, *City of Monterey* v. *Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999); *Eastern Enters.* v. *Apfel*, 524 U.S. 498 (1998); *Phillips* v. *Washington Legal Found.*, 524 U.S. 156 (1998); *Babbitt* v. *Youpee*, 519 U.S. 234 (1997); *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Lucas*, *supra*. A critical piece missing from the puzzle is a solution to the denominator problem—how to identify the relevant parcel for takings purposes. The importance of defining the property in question at the threshold of a takings inquiry makes that gap a huge one that seriously mars the coherence of modern takings jurisprudence.

Permitting the issues presented in the Petition to percolate longer in the lower courts will not illuminate or sharpen the denominator question any further. At this point, state and lower federal court decisions and the academic literature have identified and minutely discussed every plausible solution to the denominator problem (along with many solutions that are thoroughly implausible). Which if any of these fully articulated theories comports with the Takings Clause is a decision that only this Court can effectively make.

Delaying resolution of the denominator question any longer would cause great harm to home builders, farmers and ranchers, and other landowners. As the Petition amply demonstrates, on this issue of federal constitutional law involving important individual rights, courts in different jurisdictions—and even within the same jurisdiction—reach different conclusions as to whether compensation is due. The Fifth Amendment's requirement that private property not be taken for public use without the payment of just compensation should not mean different things depending

on where in the United States an owner's property is located. Large-scale developers operating in more than one jurisdiction, including many of the NAHB's members, should not have to deal with wildly different levels of constitutional protection for their various properties. Farmers in one jurisdiction should not have a different level of protection from neighbors in another.

In *Lucas* this Court noted that it is "unclear" what the proper takings equation denominator would be where "a regulation requires a developer to leave 90% of a rural tract in its natural state." 505 U.S. at 1016 n.7. This case provides the perfect opportunity to dispel that uncertainty. The District of Columbia has required petitioners to leave almost 90 percent of their original property as a lawn—the entirety of eight of nine subdivided lots. The only deviance from the *Lucas* Court's hypothetical—the tract's urban rather than rural location—is wholly immaterial for takings purposes. As set forth below and discussed in Judge Williams' opinion, we believe that it makes no legal or practical sense for the District to remove petitioner's right to build homes on its lots without paying compensation. But whatever the outcome, the importance of settling the widespread confusion over the proper denominator is beyond dispute.

II. THE DECISION BELOW CONFLICTS WITH THE MANDATE OF THE TAKINGS CLAUSE AND LEADS TO ABSURD CONSEQUENCES.

This Court held in *Lucas* that South Carolina's Beachfront Management Act, which precluded Mr. Lucas from building single-family homes on two beachfront lots that he had purchased prior to its enactment, effected a taking by depriving his property of all economic value. But what if the government had restricted development on only *one* of Lucas's two beachfront lots? Based on the court of appeals' decision in this case, Mr. Lucas would not have been entitled to *any* compensation. That cannot be right. Destroying all the value of every single contiguous parcel of land owned by a property owner cannot be the *only* way a taking occurs.

A. The Practical Ramifications Of The Court Of Appeals' Approach To The Denominator Problem Show That It Is In Error.

If the District of Columbia had formally condemned petitioner's eight lots, it would have been obliged to compensate petitioner. Yet, according to the court of appeals, petitioner gets *no* compensation even though its eight lots are of no more value to petitioner now than if they had been condemned outright. Based on the impact to the property owner, condemnation is condemnation whether it is traditional or inverse. To all intents and purposes, the District has condemned petitioner's eight lots for use as parkland or greenspace. See, *e.g.*, J.A. 320 (Historic Preservation Review Board states that the lawn "contributes significantly to the unique open space character of Connecticut Avenue"). The District should not be able to circumvent its obligation to pay just compensation by relying on historic preservation statutes to take the same land for the same park.

The decision below leads to absurd results. Suppose that Smith owns eight acres of land subdivided into one acre lots, adjacent to Jones' 10 acres, similarly subdivided. Suppose that a state agency designates 16 acres (eight lots each from Smith and Jones) as a protected area to be left in its natural state. Smith and Jones each have had eight acres of land rendered worthless and left without economic use. But if the court of appeals is right, Smith will get just compensation for the value of his eight acres, while Jones will get nothing for the value of her eight acres next door. If that is the law, one need not travel to Denmark to find that "something is rotten." W. Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, act I sc. 4.

B. The Court Of Appeals' Decision Cannot Be Reconciled With The Purposes Of The Takings Clause.

The Takings Clause protects private property against the cavalier treatment that petitioner received at the hands of the District of Columbia in this case. The Takings Clause does not

say: "Nor shall private property be taken for public use, without just compensation, *unless some economically useful property is left with the property owner.*" And such a qualifier cannot reasonably be read into the Clause consistent with the Framers' intentions. "[P]rotection of private property was a nearly unanimous intention among the founding generation." McConnell, *Contract Rights and Property Rights*, 76 Cal. L. Rev. 267, 270 (1988). The Framers viewed the protection of property rights, and particularly rights in land, as "the first object of government." FEDERALIST NO. 10, at 78 (Madison) (C. Rossiter ed. 1961). That conviction rested on the Framers' understanding that private property constitutes "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." J. NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 9 (1990). Indeed, government "is instituted no less for protection of the property than of the persons of individuals." FEDERALIST NO. 54, *supra*, at 339 (Madison). Hence, the Takings Clause, a bulwark against arbitrary rule that fosters respect for individuals and their property rights, is fundamental to our constitutional order. As this Court has emphasized, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan*, 512 U.S. at 392.

Based on these principles, the District has taken petitioners' property by preventing them from putting their eight lots to profitable use. Ownership of property is a "bundle of rights" (*Dolan*, 512 U.S. at 393) that includes "the right to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377-378 (1945); see also J. LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN § 55, at 43 (1888) ("The dullest individual among the people knows and understands that his property in anything is a bundle of rights," including "the right to use a thing in this way or that"). The court of appeals' decision treats the abrogation of one stick in that bundle of rights—the use by petitioner of eight lots—as noncompensable. But abrogation of the use stick destroys, in economic terms, the entire bundle.

What is the value of possession without use? And how can one profitably dispose of property that cannot be used? Thus, by rendering petitioners' property economically useless, the District has taken it, triggering the just compensation obligation.

If the District had physically invaded petitioners' eight lots, the taking would be unquestionable and categorical. *Lucas*, 505 U.S. at 1015; see *e.g.*, *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951). By depriving petitioners' eight lots of all reasonable economic use, the District has effectively imposed a negative easement on petitioners' property that is "the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017. See also Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv. L. Rev. 1165, 1187 (1967) (rejecting "any sharp line of distinction between governmental encroachments which take the different forms of affirmative occupancy and negative restraint"). As Justice Brennan explained, it makes little difference to the property owner "whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it." *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan J., dissenting); see also *Keystone*, 480 U.S. at 516 (regulations can cause "'as complete a loss as if the government had entered upon the surface of the land and taken exclusive possession of it'") (Rehnquist, J., dissenting). If a one-half inch cable across one's roof is a compensable taking (see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982)), and the same is true of a narrow public easement across one's beachfront property (*Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 841 (1987)), denying compensation to a landowner who is prevented from making any economic use of eight-ninths of its property defies both common sense and legal reason.

The Takings Clause, after all, subjects governmental regulation "to the dictates of 'justice and fairness.'" *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979). However desirable an

additional greenspace might be for neighborhood residents, even "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-416 (1922). And the desirability of additional open space near the National Zoo cannot override that constitutional obligation, because a similar "justification can be formulated in practically every case." *Lucas*, 505 U.S. at 1025 n.12.

In *Lucas*, this Court rejected the notion that general benefits resulting from the State's beachfront development ban, accruing to Mr. Lucas as well as to the general public, prevented the ban from being a taking. 505 U.S. at 1017. And the Court noted in *Dolan* that even if reducing flood and traffic hazards were "laudable" goals and benefitted Mrs. Dolan, it was "improper" to saddle her with more than her fair share of the costs of attaining them. 512 U.S. at 396. By the same token, forcing petitioners to lose the value of their eight lots to maintain pleasing sight lines in the Woodley Park neighborhood would "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

The unfairness of the decision below is compounded by the strategic gamesmanship that it would encourage. A rule that allows government to regulate eight-ninths of an owner's land to the point where it has absolutely no economic use, yet avoid paying compensation, is bound to encourage regulatory overreaching. A city could obtain parks for free under that approach simply by leaving burdened owners with small parts of their land. Governments could reward favored voters by providing amenities without raising taxes, simply by targeting land use regulations to portions of the properties of less favored landowners. "[A]djusting the benefits and burdens of economic life" is one thing (*Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978)), but seizing from one and bestowing on another is something else again. See *United States* v. *Security*

Indus. Bank, 459 U.S. 70, 78 (1982) (Takings Clause protects against "a general economic regulation which in effect transfers the property interest from a private [party] to a private [party]"). In this case, the District's transformation of *lawn* into an historic monument exemplifies the risk of reckless regulation inherent in the court of appeals' approach.

The Takings Clause not only guards against such unfair and discriminatory conduct, but in doing so fosters efficient government. As Judge Williams explained below, the Takings Clause properly applied serves "as a disincentive to wasteful government activities" by providing "a check on government's likely tendency to waste resources by treating private property as a free good." Pet. App. 18a. If the District is told that it must pay for the land it covets for open space, it will have to fully account for its own resources and those of all its citizens and property owners. Such accountable decisionmaking, in addition to its more general benefits, would comport with the Constitution.

III. ON ANY DENOMINATOR THEORY, THE DISTRICT TOOK PETITIONERS' PROPERTY.

Amici NAHB and AFBF agree with petitioner, for the reasons set forth in the Petition, that the correct way to determine whether regulations affecting less than all of a parcel effect a categorical taking is by focusing on the regulated portion of the property. Thus, the long-developed Lot 106 should be factored out of the inquiry as to whether the District took petitioners' property by preventing the later development of Lots 107-114. We note, however, that even under the multi-factor test derived from the Federal Circuit cases, which the court of appeals' majority applied, the decision below is erroneous.

The Federal Circuit has played a leading role in defining and analyzing the denominator problem in regulatory takings cases. In *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994), the plaintiff acquired 250 acres and later developed all but 51 of those acres for residential units. When it later sought to develop the remaining 51 acres, New Jersey authorized it to

develop 12.5 acres so long as it dedicated the remaining 38.5 acres to the state. A federal agency then refused to authorize development of the 12.5 acres. The Federal Circuit held that the relevant parcel for takings purposes was the 12.5 acres, not the 51 acres or the 250 acres, and it found a taking because the property owner was deprived of all viable economic use of those 12.5 acres. *Id.* at 1181. See also *Palm Beach Isles Assocs.* v. *United States*, 208 F.3d 1374, 1380-1381 (Fed. Cir. 2000) (proper denominator was the 50.7 acres for which permit was denied, not the entire 311.7 acres originally purchased by plaintiffs); *Florida Rock Indus.* v. *United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) (proper denominator was 98-acre tract that government had denied permission to develop, not the entire 1560-acre parcel purchased by plaintiff).

Although the Federal Circuit has described its multi-factor test for the proper denominator as a "flexible approach, designed to account for factual nuances" (*Loveladies Harbor*, 28 F.3d at 1181), the court has "objectif[ied] the factual inquiry" in its recent cases raising the denominator problem. See Tedrowe, *Conceptual Severance and Takings in the Federal Circuit*, 85 Cornell L. Rev. 586, 616 (2000). Here, as described by Judge Williams, the court of appeals disregarded objective and central factors supporting petitioners' position and instead relied on manipulable factors of little or no significance. It is critical that the Court not only set to right the court of appeals' misplaced resolution of the denominator problem, but also provide some guidance on how any multi-factor test is to work.

One important factor should be whether state property law authorizes the division of the property and the use that is being denied. See *Lucas*, 505 U.S. at 1016 n.7. Another should be the independent economic viability of each of the separate parcels. See *Machipongo Land & Coal Co.* v. *Department of Envtl. Resources*, 719 A.2d 19, 28 (Pa. Commw. Ct. 1998); Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1557 (1994). Yet another should be whether the authorities treat the regulated and unregulated parcels

differently for zoning or taxation purposes. See *American Sav. & Loan Ass'n* v. *Marin County*, 653 F.2d 364 (9th Cir. 1981). In this case, any test that does not give controlling weight to the fact that petitioners' property was legally subdivided (Pet. App. 20a), that the subdivided lots have been taxed as developable property at a higher rate than developed property (*ibid.*), that the undeveloped lots add no significant value to the developed lot (Pet. App. 9a), and that the undeveloped lots retain no reasonable economic use (Pet. App. 22), is seriously mistaken and at odds with the entire thrust of the Takings Clause.

This Court suggested in *Lucas* that the property owner's reasonable expectations may be an important factor in the definition of the relevant parcel. 505 U.S. at 1016 n.7. That makes sense, so long as the general *possibility* of regulation in this highly regulated society does not equate to an expectation that the value of every development may be regulated out of existence. As Judge Williams pointed out, in this case it is simply "farfetched to conclude that District Intown, merely because of its proximity to the zoo, should reasonably have anticipated an absolute ban on construction." Pet. App. 21a-22a. Nor did petitioner have any reason to expect that general and longstanding preservation statutes would block the routine building of townhouses on empty lots next to its existing apartment building. To the contrary, petitioner had every reason to expect that it could rely on the District's approval of its application to subdivide its property into nine lots and DCRA's subsequent zoning approval. Pet. 2. See 2 J. AUSTIN, LECTURES ON JURISPRUDENCE § 1128, at 256-257 (Robert Campbell ed. 1875) ("whenever expectations have been raised in accordance with the declared purpose and concession of the state, to disappoint those expectations by recall of the concession * * * [is] pernicious").

Instead of taking an objective approach to the denominator problem, the decision below, as Judge Williams recognized, "elevates formal concepts over economic reality and tends to strip the Clause of its potential for fulfilling the framers' likely purposes." Pet. App. 17a. In particular, the factors relied on by the

court of appeals, including contiguity, simultaneity of acquisition, and historical use, subordinate the actual economic relationship between the tracts to misty historical and tangential considerations.

By making contiguity a controlling factor, the court of appeals effectively declared a "presumption that contiguous parcels under common ownership should be treated as one parcel for purposes of the takings analysis." Pet. App. 19a. But no such presumption governs eminent domain cases: if a person owns an office building next to a house and the government condemns the office building, the government has to pay for the value of the office building, contiguous to the house or not. Perhaps regulatory takings cases require a more complex analysis, but that would not justify the court of appeals' loaded presumption. Moreover, placing so much emphasis on contiguity discriminates against large holdings: the larger the parcel, the more likely the survival of some economically viable use after regulation, giving government a free shot at stopping any development on such holdings.

Indeed, under the contiguity presumption, if A and B each own an empty lot near a zoo, with A residing in his house on an adjoining lot and B in her house across town, precluding development of the two empty lots will "take" B's property but not A's. This illustration shows that contiguity of parcels is part of the denominator *problem*; it rarely will offer a *solution*.

Simultaneity of acquisition and unity of ownership are also factors of limited value. If one person buys a sugar mill and a cattle ranch at the same time, that says nothing about whether the government's destruction of all the sugar mill's value decades later is or is not a taking. Moreover, such factors necessarily generate perverse incentives. For example, if unitary acquisition and ownership are enough to defeat a takings claim, then land owners would do well to contract for "shills" to transform what really is one transaction into several and to create multiple "paper" owners. See Rose, Mahon *Reconstructed: Why the Takings Issue*

is Still a Muddle, 57 S. Cal. L. Rev. 561, 568 (1984) (warning that misapplication of Takings Clause "may cause owners to make elaborate and socially useless splits of their property rights"). Such game-playing by property owners would be just as costly and inefficient as the maneuvering by the District of Columbia in this case. The Framers did not intend, when they gave constitutional protection to the ownership of property, to create a game in which the rules were subject to manipulation by either the government or property owners.

In sum, if the lower courts should determine the denominator by focusing on the land subject to the regulation at issue, as we strongly believe, this Court should say so. If that determination instead should rest on a broader multi-factor test, this Court urgently needs to convey guidance on what the relevant factors are and how to apply them. In either event, reversing the decision below will permit the Takings Clause to take its place "as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980).

IV. THIS COURT SHOULD MAKE CLEAR THAT DE MINIMIS OR SPECULATIVE USES ARE NOT ENOUGH TO DEFEAT A TAKINGS CLAIM.

The District found that "any construction that destroyed the lawn would be incompatible with the lawn's status as a historic landmark." Pet. App. 13a; J.A. 368. Yet Judge Edwards' opinion concluded that even looking at the eight lawn lots separately, there was no taking because those lots were not "rendered 'valueless' by the regulation at issue." Pet. App. 13a. According to the majority, something "marginally less than total destruction" is never a taking. *Ibid.*

That Judge Edwards cited *Lucas* for this proposition is remarkable. In *Lucas*, Justice Blackmun *in dissent* described the conclusion "that the property had lost all economic value" as "almost certainly erroneous" because "[p]etitioner still can enjoy other attributes of ownership, such as the right to exclude others"

or "to alienate the land." 505 U.S. at 1043-1044. According to Justice Blackmun, Lucas' ability to continue to "picnic, swim, camp in a tent, or live on the property in a moveable trailer" was enough to counter his takings claim: "land has economic value [sufficient to defeat a takings claim] where the only residual economic uses are recreation or camping." But the Court did not adopt that view.

As Judge Williams complained, under the standard applied by the majority in this case (and by Justice Blackmun in dissent in *Lucas*), "no regulation can ever effect a total taking." Pet. App. 28a. There will always be some conceivable use of property. Here, the owners could picnic on the lawns, or play croquet, or perhaps create spectacular flower gardens to enjoy. Maybe they could even charge others to use the property in these ways. But none of those are reasonable economic uses. At best, they create de minimis value that bears no comparison to the value of the land for building. This Court should grant plenary review in this case to make clear that "the very barest thread of value, yielded by some thoroughly bucolic use," does not "defeat a total takings claim." Pet. App. 28a.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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IN THE

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Petitioners,

v.

DISTRICT OF COLUMBIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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1. The first of the two questions presented in the petition asks how courts should identify the relevant parcel of real property for takings purposes when, as here, the property owner owns multiple geographically contiguous tracts, some of which have been rendered valueless by government regulation and some of which have not.

Remarkably little of the District's brief is devoted to the certworthiness, as opposed to the merits, of the relevant parcel issue. In fact, all that the District says on this score is that there is "[n]o relevant split" and are "no significant disagreements" among certain lower courts. Opp. 1, 12. The District's attempt to downplay the importance of the issue is, however, quite unconvincing.

First, over and above any split or disagreement among the lower courts, this Court has itself recognized that the relevant parcel issue is unresolved, difficult, and important. *See Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016-17 n.7 (1992). When the Court itself acknowledges that "it is unclear [how] we would analyze" the relevant parcel issue on facts similar to the facts of this case; that this issue is a "difficult" one; and that "this uncertainty * * * has produced inconsistent pronouncements by the Court," *id.*, there can be no doubt that the issue is sufficiently important to warrant review by this Court. *See also Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987) (determining the relevant parcel is "one of the critical questions" in takings analysis); *id.* at 514-515 (Rehnquist, C.J., dissenting) ("the admittedly difficult task of defining the relevant parcel" is "all important").

Numerous commentators, too, have noted the importance of the issue and called for the Court to resolve it. *See* Pet. 10; *see also* Robert Meltz, *Wetlands Regulation and the Law of Regulatory Takings*, 30 Envtl. L. Rep. 10468, 10479 (June 2000) ("The relevant parcel determination is often a make-or-break one—the litigant that prevails on this issue likely will win on the taking claim."); Dwight H. Merriam, *What is the Relevant Parcel in Takings Litigation?*, SC43 ALI-ABA 505, 544 (1998) ("[A]bsent further clarification from the U.S. Supreme Court [on the relevant parcel issue], it is difficult if not impossible to discern many of the applicable ground rules in regulatory takings law.").

Second, the relevant parcel issue has, in fact, confounded the lower courts, which, as explained in the Petition, are now divided into three competing camps on the issue. *See* Pet. 11-18.[1] Thus, to say that "the lower courts are hopelessly

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[1] The District cites a string of cases (Opp. 12-13) in an attempt to show that the balancing approach utilized by the court below is

split," James S. Burling, *What if the Government Prohibits the Use of Only Some of Your Property—Has There Been a Regulatory Taking?*, SE18 ALI-ABA 113, 119 (1999), is not, as the District claims, an example of "overwrought rhetoric," (Opp. 12)—but a statement of fact. *See also* Merriam, *supra*, at 540-541 (courts "will likely continue to address the relevant parcel issue in disparate fashion. The question is certain to arise with considerable frequency, given its critical importance to resolution of the ultimate issue of taking liability.") (footnote omitted).

2. a. The bulk of the District's brief is dedicated to the proposition that, when performing takings analysis, this Court's cases require consideration of the "parcel as a whole" rather than a portion thereof. *See* Opp. 8-11. But this simply begs the fundamental question in this case—what is the whole parcel? The very argument that petitioners are making is that each of the eight vacant lots comprising the lawn is a distinct parcel that should be analyzed separately for takings purposes—because, among other reasons, the District government granted regulatory approval to subdivide the property into the nine present lots, taxed the eight lots at a higher rate due to their developability, and granted zoning approval for the proposed construction on each of the eight lots. *See* Pet. 20-21; *Lucas*, 505 U.S. at 1016-17 n.7 (suggesting that the relevant parcel be determined based on "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land" as to which a taking is claimed). Furthermore, it is the eight lots that are burdened by the District's historic landmark designation—a regulation that precludes all development on each of the lots. *See* Pet. 11-12, 18-19.

Accordingly, the asserted " 'parcel-as-a-whole' doctrine" (Opp. 10) does not resolve the issue in this case, which raises

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the dominant approach, but all of the District's cases come from only three jurisdictions.

the antecedent question of how "the parcel" is to be determined. Perhaps takings law "does not divide a *single parcel* into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated," *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 130 (1978) (emphasis added), but petitioners' claim is precisely that they own not a single parcel but nine parcels, and that the District has taken eight of them by denying petitioners the right to put those parcels to any economically valuable use.

For the same reason, the District's contention that this is "not an [sic] case in which petitioners have been denied economically viable use of their property" (Opp. 15) also begs the question. If each of the eight vacant lots is viewed as "the property," petitioners *have* been denied all economically viable use of their property—they have been forced to leave each of those lots in a completely undeveloped state as a grass lawn.

b. In any event, the District's parcel-as-a-whole doctrine simply cannot apply where, as here, the government appropriates—or denies all economically viable use of—a portion of real property contained within a larger tract. In its *Nollan* and *Dolan* cases, the Court made clear that a taking certainly *does* occur when the government requires a landowner to surrender to the public the use of a portion of a single parcel of land. *See Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis * * *, we have no doubt there would have been a taking."); *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994) ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, * * * a taking would have occurred.").

Obviously, the taking of a portion of a parcel cannot be defended on the ground that the whole parcel has not been

taken. As the Federal Circuit has said, "if the Government took just 5 acres [of a 100 acre tract] and left the property owner with 95, there would be no question that the owner was entitled to compensation for the parcel taken." *Florida Rock Indus., Inc.* v. *United States*, 18 F.3d 1560, 1569 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). *See also Lucas*, 505 U.S. at 1016 n.7 (discussing hypothetical regulation requiring developer "to leave 90% of a rural tract in its natural state"); *id.* at 1019 n.8 (rejecting dissent's "assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation"). Here, the District has denied petitioners all economically viable use of eight of their lots; the fact that they still have a valuable ninth lot does not diminish the Takings Clause violation.

The District's citation of *Dolan* in support of its parcel-as-a-whole doctrine (Opp. 9) is particularly inapt. For it was not the Court, but the *dissent*, in *Dolan* that claimed that "the analysis [must] focus on the impact of the city's action on the entire parcel of private property." 512 U.S. at 400 (Stevens, J., dissenting). And the cases that Justice Stevens cited in support of that claim—*Penn Central Transportation Co.* v. *New York City*, *supra*; *Andrus* v. *Allard*, 44 U.S. 51 (1979); *Keystone Bituminous Coal Association* v. *DeBenedictis*, *supra*; and *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993)—are the very same cases on which the District now relies. *See* Opp. 9-11. Thus, the District is merely recycling an argument and case law that failed to carry the day in *Dolan*.[2]

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[2] In any event, none of these four cases is similar to this case. Although both *Penn Central* and *Keystone* involved real property, neither involved a ban on development of an entire parcel or a portion thereof. Instead, each involved a single parcel as to which it was claimed that certain rights had been taken (in *Penn Central*, air rights; in *Keystone*, mineral rights). And neither *Andrus* nor *Concrete Pipe* involved real property. *Andrus* involved personal

3. The District also seeks to defend the judgment below by observing that, although petitioners have been denied permission to build new townhouses on their property, they have not been restricted in their ability to operate and profit from their apartment building. Opp. 1. But if the District means that a taking cannot occur when the government denies future development plans, but only when it puts a stop to an existing use of land, that is not the law. *Nollan* and *Dolan* again prove the point. The Nollans wanted to replace their small beachfront bungalow with a larger three-bedroom house. Ms. Dolan wanted to replace her existing plumbing and electric supply store with one nearly double the size. And in both cases, the Court held that the State's refusal to permit these development plans violated the Takings Clause. It would have been no answer to say to these property owners that they have not had their existing structures taken from them, and it is no answer to petitioners to say that the District has not taken their apartment building from them.[3]

4. The District states that "petitioners' proposed rejection of the parcel-as-a-whole standard endangers a broad variety of traditional land use planning regulations" (Opp. 14), but the District simply asserts this and never explains why this is so. In any event, as explained above, petitioners contend that each of the eight vacant lots *is* a whole parcel for takings purpose. Finally, as explained in the petition, *see* Pet. 18-19 & n.6, petitioners do not suggest that compensation is necessarily required when the government prohibits devel-

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property (bald eagle feathers), and *Concrete Pipe* involved intangible property (employer pension liability).

[3] Under the District's approach, the District government could have denied petitioners all use of their apartment building and seven of their eight vacant lots without violating the Takings Clause, so long as petitioners were permitted to make valuable use of the smallest of the vacant lots.

opment on property that could not itself be put to an economically productive use.

5. The District's claim (Opp. 16-17) that petitioners lack reasonable, investment-backed expectations—even if it were true (which it is not)—is legally irrelevant. A property owner must demonstrate such expectations to prevail on a claim under the three-factor *Penn Central* test. But under the *per se* rule of *Lucas*, a takings claim is established if it is shown, without more, that the governmental regulation at issue leaves the property with no economically valuable uses. *See Lucas*, 505 U.S. at 1015 ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."); Pet. App. 6a-7a (discussing requirements of *Penn Central* and *Lucas*). Although petitioners brought claims under both *Penn Central* and *Lucas* in the courts below, in this Court they advance only the *Lucas* claim. Under *Lucas*, petitioners have suffered a taking of their property because the District has left their eight vacant lots "without economically beneficial or productive options for [their] use." *Lucas*, 505 U.S. at 1018.

6. The second question presented in the petition relates to the D.C. Circuit's ruling that, even if petitioners were correct on the relevant parcel question, they have nevertheless not been denied all economically valuable use of their eight vacant lots within the meaning of *Lucas*. In its brief, the District suggests for the first time that petitioners might be able to build a tennis court, swimming pool, or ice skating rink on the lots, or put a parking garage underneath the lots. Opp. 18. This suggestion is fanciful at best. As the D.C. Circuit itself noted, "[t]he record contains a finding by the Mayor's agent that *any construction that destroyed the lawn* would be incompatible with the lawn's status as a historic landmark." Pet. App. 13a (emphasis added) (citing D.C. Cir. J.A. 368). And as Judge Williams rightly observed, "[i]t is hard to imagine what 'economically viable' use that con-

straint leaves" apart from "some thoroughly bucolic use." *Id.* at 28a. Petitioners could hardly construct the recreational or parking facilities that the District now suggests without destroying the lawn.

Finally, it is difficult to square the District's new suggestion with its statement earlier in its brief that "it seem[s] more likely than not that construction on at least one recorded lot would be deemed incompatible with the landmark, *no matter what plan is proposed.*" Opp. 8 n.4 (emphasis added).

* * *

This Court has said that the Fifth Amendment's Takings Clause is "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment" and should not "be relegated to the status of a poor relation." *Dolan*, 512 U.S. at 392. The D.C. Circuit's decision in this case, however, bids fair to relegate the Takings Clause to just that status.

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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